BIENNIAL REPORT
OF
WILLIAM L. BOATRIGHT
ATTORNEY GENERAL
OF COLORADO
1925 - 1926

Biennial Report

Of The

ATTORNEY GENERAL

Of The

State of Colorado

Years 1925 and 1926

WILLIAM L. BOATRIGHT
Attorney General

THE BRADFORD-ROBINSON PTG. CO.
DENVER, COLORADO
1927

ATTORNEYS GENERAL OF COLORADO

From the Organization of the State

A. J. Sampson	1877-1878
Charles W. Wright	1879-1880
Charles H. Toll	1881-1882
David F. Urmy	1883-1884
Theodore H. Thomas	1885-1886
Alvin Marsh	1887-1888
Samuel W. Jones	1889-1890
Joseph H. Maupin	1891-1892
Eugene Engley	1893-1894
Byron L. Carr	1895-1898
David M. Campbell	1899-1900
Charles C. Post	1901-1902
Nathan C. Miller	1903-1906
William H. Dickson	1907-1908
John T. Barnett	1909-1910
Benjamin Griffith	1911-1912
Fred Farrar	1913-1916
Leslie E. Hubbard	1917-1918
Victor E. Keyes	1919-1922
*Russell W. Fleming	1923
Wayne C. Williams	1924
William L. Boatright	1925-1926

*Mr. Fleming died in December, 1923, and Mr. Williams was appointed to fill the vacancy created.

STATE OF COLORADO LEGAL DEPARTMENT

ATTORNEY GENERAL
William L. Boatright

DEPUTY ATTORNEY GENERAL
Charles Roach

ASSISTANT ATTORNEYS GENERAL
S. E. Naugle
[1]John F. Reynes
Jean S. Breitenstein
Otto Friedrichs
A. L. Beardsley
[2]Louis W. Burford

SPECIAL ASSISTANT ATTORNEYS GENERAL
John C. Vivian
Oliver Dean
Charles H. Haines

STENOGRAPHIC AND CLERICAL ASSISTANTS
Miss Margaret E. Fallon
[3]Mrs. Christean M. Crafts
[4]Miss Lida C. Reno
[5]Mrs. Jeanne M. Gale
[6]Miss Anna G. Landy
[7]Miss Emma Bortt

INHERITANCE TAX BUREAU

INHERITANCE TAX COMMISSIONER AND ASSISTANT ATTORNEY GENERAL
Andrew H. Wood

DEPUTY INHERITANCE TAX COMMISSIONERS
Charles A. Eaton
Arthur M. Morris

[1] Died August 31, 1925.
[2] Appointed September 15, 1925, to fill vacancy caused by death of John F. Reynes; resigned December 1, 1926.
[3] Resigned February 1, 1925.
[4] Appointed to vacancy caused by resignation of Mrs. Christean M. Crafts; resigned June 1, 1926.
[5] Resigned April 15, 1925.
[6] Appointed to fill vacancy caused by resignation of Mrs. Jeanne M. Gale.
[7] Appointed to fill vacancy caused by resignation of Miss Lida C. Reno.

INHERITANCE TAX APPRAISERS

G. W. Moscript

O. S. Brinker

ASSISTANT INHERITANCE TAX COMMISSIONER

J. W. Klein

STENOGRAPHIC AND CLERICAL ASSISTANTS

[8]Miss Alice Creighton

Miss Rita Fox

[9]Miss Margaret Tierney

Mrs. M. L. Schneider

[10]Miss Anna Stewart

[11]Mrs. Margaret Kranich

[8] Resigned July 23, 1925.
[9] Resigned February 1, 1925.
[10] Appointed to fill vacancy.
[11] Appointed to fill vacancy.

BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF COLORADO

SCHEDULE I

To His Excellency
CLARENCE J. MORLEY,
Governor of Colorado.

Dear Sir:

Pursuant to law, I transmit to you herewith my Report as Attorney General, for the biennial term beginning January 13, 1925, and ending January 11, 1927. For convenience, the same is submitted under three general headings:

1. Preliminary summary and report;

2. Cases disposed of and still pending in the courts, Federal and State;

3. Opinions rendered during the term.

The volume of business in this department, as in most others, constantly increases. It may, in my opinion, be conservatively estimated that the increase during the biennial period over the one immediately preceding is at least twenty per cent. The growth and development of the State, its advance in material wealth and the constant evolution of the commonwealth from a new to an older society naturally brings about such a result while special emergencies, such as controversies over freight and express rates and bus and truck transportation problems have materially contributed to the same result. There is no good reason to expect any material reduction of the work of this department in future years, but rather an increase of its burdens and responsibilities.

NEW MEXICO-COLORADO BOUNDARY CASE

This case was referred to in the Biennial Report of 1923-1924. The case was argued and submitted to the Supreme Court of the United States, December 3, 1924. January 26, 1925, the Court, in an opinion delivered by Mr. Justice Sanford, decided the case in favor of Colorado, and held that the line surveyed and established by Carpenter, in 1902, between Colorado and New Mexico should be abandoned and all marks thereof obliterated. The Court

further held that the boundary as surveyed and established by Darling, in 1869, is the true boundary between the two states. The bill of New Mexico praying the establishment of the Carpenter line was dismissed. The Court further held that the Darling line should now be resurveyed and re-marked by a commissioner or commissioners to be appointed by the Court, and the parties were given thirty days within which to submit a form of decree carrying into effect the conclusions of the Court.

March 2, 1925, New Mexico filed a motion for modification of the decree and on March 9 this motion was denied. April 13, 1925, a final decree was entered in accordance with the findings and opinion of the Court previously announced. This decree designated Arthur D. Kidder, cadastral engineer, as a commissioner to run, locate and mark the boundary between the two states, and ordered that all the costs of the case, including the compensation and expenses of the commissioner, should be borne in equal parts by the states of New Mexico and Colorado.

The 25th General Assembly, which met in January, 1925, appropriated fifteen thousand dollars to pay Colorado's share of the expenses of resurveying and re-marking the boundary, and Colorado's portion of the unpaid costs of said suit. None of this money was expended because the commissioner has not yet begun to perform the work required of him by the decree. This appropriation therefore reverted to the general fund of the State at the end of the biennial fiscal period, and this will necessitate another appropriation of a like amount by the present General Assembly, the same to be available when the commissioner shall enter upon the performance of his services.

The New Mexico Legislature thus far has failed to meet Colorado's appropriation for this re-survey, and we are not advised when this will be done, but it is necessary that Colorado be prepared to meet her part of these expenses when called upon by the commissioner for the compensation and expenses to which he will be entitled.

ABANDONMENT OF RAILROADS

At the commencement of the biennial period, there was pending in the United States Supreme Court from the United States District Court for the District of Colorado, an appeal involving the abandonment of what was known as the Romley-Buena Vista line of railroad, belonging to the Colorado and Southern Railway Company and located in Chaffee County, Colorado. The appeal had been filed by the previous administration, but, there being no funds available with which to pay the costs of the record and briefs, an appropriation of the General Assembly of $1,400.00 was required to provide funds for this purpose.

The record and briefs were prepared, oral argument was had, but the decision of the Court was adverse to the contention of the State, and the Interstate Commerce Commission was sustained in its order permitting the abandonment of the line.

GASOLINE TAX PROBLEMS

The collection of the gasoline tax has received the special attention of the department. A definite policy was adopted and persistently followed. The department is of the opinion that it has no power to compromise the tax due, either as to the amount thereof, or the time of payments. Arrangements were made whereby this department is promptly advised of the standing of each taxpayer. We have also applied the penalty and interest clauses of the law in all cases where the taxpayer has failed to respond within a reasonable time to demand for payment of delinquent taxes. The result of this persistent and uniform procedure has been to create a wholesome respect for the law, and the dealers are now almost without exception making prompt settlements. The delinquencies are now reduced to by far the smallest amount outstanding of any of the recent years, and it may fairly be said that the two-cent tax on gasoline is now paid more promptly than any other tax collected in the State.

EXPRESS AND FREIGHT RATE CASES

One of the subjects requiring a great deal of time and effort during the past two years has been that of express and freight-rate problems before the Public Utilities Commission and the Interstate Commerce Commission. There have been some seven or eight different cases before the Interstate Commerce Commission, a record of which will be found in the proper place in this report.

The care of these matters has required the whole time of an assistant in this office for approximately twelve months of the biennial period and, as illustrating the extent of the time and expense required, I may say that evidence was taken before Interstate Commerce Commission Examiners, at Grand Junction, Durango, Farmington, N. M., Denver, San Francisco, Dallas, Texas, St. Paul, Minn., Kansas City, Mo., Chicago, Ill., Washington, D. C., and other points. In addition to the taking of testimony, briefs were prepared for filing with and oral arguments made to the Interstate Commerce Commission in Washington.

This office acknowledges very valuable assistance from the educational and other interested institutions and organizations of the State in the gathering of evidence and expert data necessary for the proper presentation of the cases.

One of the direct results of these hearings was the denying by the Interstate Commerce Commission to the railroads of the west, including this State, a flat increase of five per cent on freight rates, which, if allowed, would have placed upon the people of the State an additional burden of approximately five million dollars per year.

DRAFTING OF BILLS

A branch of the work of this department which has grown enormously in recent years is the drafting of bills for members of the General Assembly. This work is not among the duties of the office of the Attorney General as defined by the statutes of the State. Nevertheless, the task has been cheerfully undertaken and every possible aid extended to the various members in the preparation of bills and amendments thereto. The demands upon the department for work of this kind have so increased that during the twenty-fifth regular session, the full time of my deputy and one assistant was occupied during the first month of the session, and a large part of the time of the deputy during the remainder thereof. At least 200 bills, many of them of a comprehensive and important character, were drawn by this department to be introduced at that session. In many of the older states, special provision has been made by law for taking care of this line of work. For instance, in Illinois, a legislative reference bureau has been established, and placed in charge of a lawyer well-versed in constitutional law, and vested with the duty of aiding members of the legislature in the preparation and amendment of bills. I believe, however, that in the interest of economy, at least, this class of work may well be left in the hands of this department for the present.

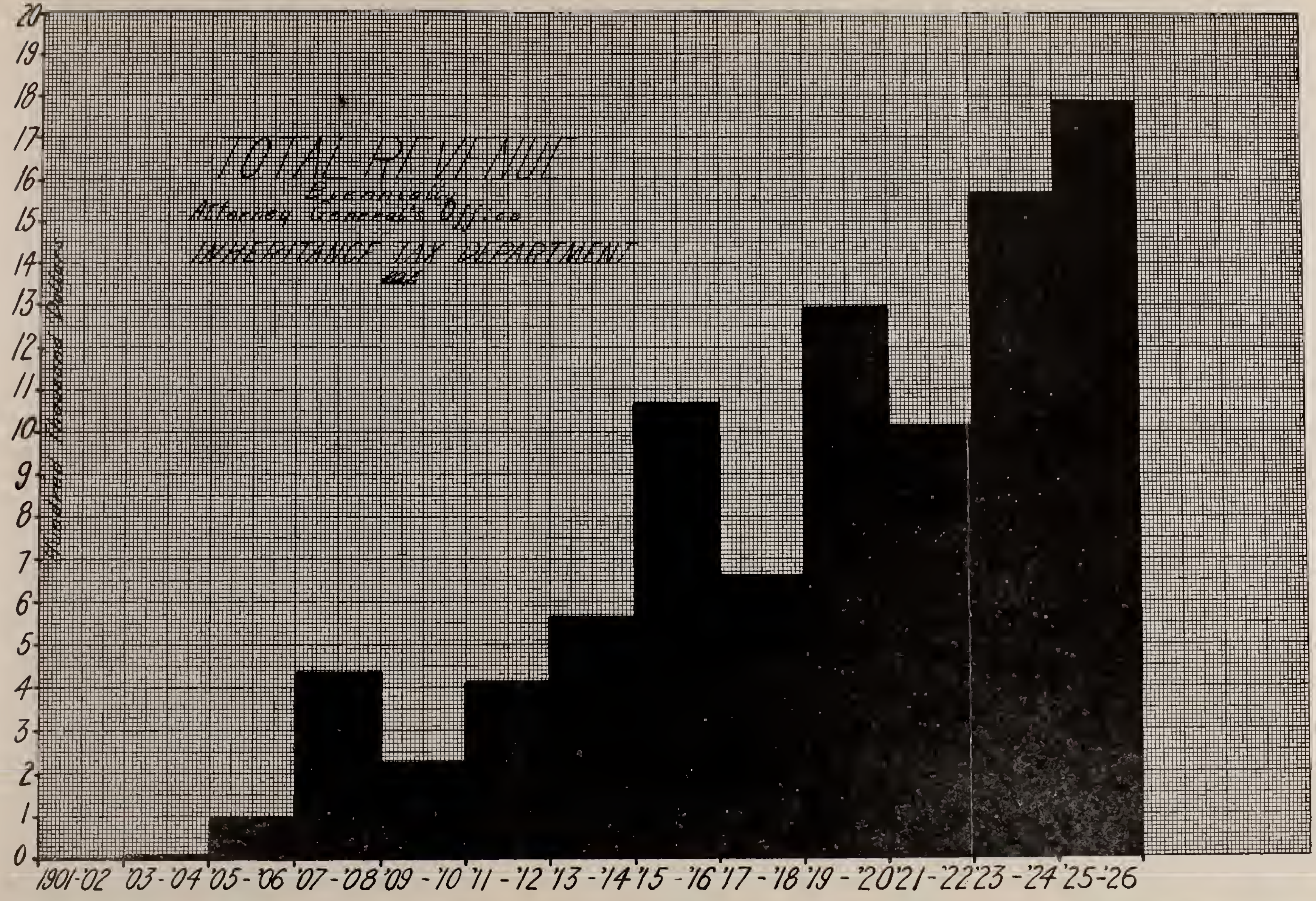
INHERITANCE TAX DEPARTMENT

Through the Inheritance Tax Department there has been collected during the last biennial period the amount of $1,787,219.83. The expense of that department for the same period amounts to the sum of $49,738.60, which is 2.7+ per cent of the amount collected. The refunds of tax made under order of court and by requests approved by the State Auditing Board amount to $1,775.69.

The following tabulation affords some indication of the volume of business of the department during the biennial period:

Number of Treasurer's Receipts issued on estates handled	6,989
Receipts issued on estates paying tax	1,131
Receipts issued on estates paying $1.00 fee	4,282
Receipts issued on estates paying $5.00 fee	1,554
Receipts issued on estates paying additional fees or tax	22
Number of estates paying $10.00 examination fee, these being included in certain of the above mentioned receipts	947

Attached hereto is a graphic comparison of inheritance taxes collected in each of the thirteen biennial periods since the Inheritance Tax Law went into effect. It will be noted by this comparison that the taxes collected during the fiscal period just closed are $219,327.97 in excess of the highest figure theretofore reached under the operation of this law.


TOTAL REVENUE
Attorney General's Office
INHERITANCE TAX DEPARTMENT
20
19
18
17
16
15
14
13
12
11
10
9
8
7
6
5
4
3
2
1
0
1901-02
'03-'04
'05-'06
'07-'08
'09-'10
'11-'12
'13-'14
'15-'16
'17-'18
'19-'20
'21-'22
'23-'24
'25-'26

STATE SCHOOL LANDS—CONTESTS

This department was called upon to defend the contests instituted by the Federal Government affecting the State's title to an extensive area of its most valuable school lands.

Section 15 of the Act of Congress approved March 3, 1875, setting aside to this State Sections 16 and 36 in each township, or other lands equivalent thereto, for the support of the common schools, provided that "all mineral lands shall be excepted from the operation and grant of this act."

The question involved was whether, after the lapse of almost fifty years, the Federal Government has the right to deprive the State of any of these lands, and appropriate for its own use the most valuable area of Colorado's public school lands, when it has no other public domain of value to offer in exchange as lieu lands.

For more than forty years the Department of the Interior and the United States General Land Office had made no claim to these Colorado school lands, and the field notes of the approved survey of each of the Sections 16 and 36 were considered controlling as to the question of mineral or non-mineral land at the time the survey was made.

During the past few years the Department of the Interior have revised and extended its rules with the idea of withdrawing all of the mineralized area embraced in the grants to the public lands states, and the contests involving Colorado school lands were apparently but a beginning of many contests to be filed by the Government.

Since 1920, a contest involving the question of the known mineral character of a portion of a school section in La Plata County has been pending, the same having gone twice by appeal to the Secretary of the Interior. Under date of April 27, 1926, the Federal Government instituted ten additional contests involving fourteen sections of school land in La Plata County, and required the State to appear for hearing not later than June 20, 1926.

By reason of lack of funds both in this department and the State Board of Land Commissioners, this office promptly petitioned the Secretary of the Interior asking that hearing on these contests be deferred until after the meeting of the 26th General Assembly so that funds might be supplied to oppose these contests in behalf of the State. This petition was granted and the trial order temporarily suspended.

It has been necessary for this department to make several trips to Washington to appear before the Secretary of the Interior and the Public Lands Committee of the House and the Senate in an effort to protect the school lands of the State.

The Western States co-operating, a great deal of time and effort was spent in assisting the western senators and representatives in Congress in securing the passage of an act quieting the title to such lands in the respective states. The United States Senate had passed repeatedly a very broad act covering this question,

but until the present short session of the Congress, such legislation has failed of passage in the lower house.

Since the first of January, 1927, however, as a result of the continued efforts of the Western States, including Colorado, the Congress of the United States has passed and on January 26, 1927, the President signed, an act confirming title in the State to all numbered school sections, whether mineral in character or not. This act expressly excepted from its operation so-called lieu or indemnity lands, but this exception is not important to Colorado, because it is conceded by the Department of the Interior that when such lands are once certified to the State its title thereto can thereafter be impeached only by a proceeding in the courts on the ground of fraud. The act also requires the State when disposing of school lands, to reserve the coal and other minerals therein, but this reservation is merely in accord with the already established practice of our State Board of Land Commissioners.

WATER RIGHTS

At the request of the Colorado River Commissioner and your Excellency, this department has given a great deal of time and attention to the various problems pertaining to the waters of the rivers of Colorado which are interstate in character. The main streams involved have been the Colorado River, the North Platte, the Rio Grande and the Arkansas.

A very large amount of time has been spent before the United States Senate Committee, investigating the question of the Colorado river. Several trips to Washington were necessary to appear before the Senate and House Committees in reference thereto, and also appearing before the Committee in the taking of testimony in the States of California, Arizona and Nevada.

The Colorado River treaty has not yet been finally settled, and there is threatened litigation upon the part of New Mexico against Colorado over the question of rights to the use of waters of the Rio Grande River. There are two suits pending, semi-public in character, between citizens of the States of Kansas and Colorado, with reference to the waters of the Arkansas River.

An interstate treaty has been prepared between the States of Wyoming, Nebraska and Colorado, pertaining to the division of the waters of the North Platte between the three states.

These river matters will undoubtedly require a great deal of time and attention upon the part of the department during the ensuing biennial period.

CONCLUSION

In conclusion, it is only just to commend the entire office force, both men and women, for the very loyal and able work they have performed during the biennial period. Many of them have served at a lower compensation than provided for like services during

the preceding term, and in spite of this they have rendered services to the State which, for loyalty and ability, have never been excelled. The same can be said with reference to the Inheritance Tax Department.

To single out and mention each member of the force, giving special credit where it is due, would require too much space for this report, but I cannot too highly commend the loyalty, integrity and devotion of the entire force to the interests of the people of Colorado in the performance of the duties which devolved upon them, and to them is due the credit for whatever degree of success has been attained by the office in the performance of its duties to the public during the period just closing.

Respectfully submitted,

WILLIAM L. BOATRIGHT,
Attorney General.

SCHEDULE II

LIST OF ALL CASES PENDING AND DISPOSED OF IN ALL COURTS

CASES IN THE SUPREME COURT OF THE UNITED STATES

State of New Mexico v. State of Colorado.

Original proceeding to establish southern boundary of Colorado and northern boundary of New Mexico.

Decision of the Supreme Court of the United States handed down January 26, 1926, fully sustaining Colorado's contention that the line of the Darling survey was a true boundary and ordering that said line be re-surveyed and re-established, at the joint expense of New Mexico and Colorado, and that the line of the Carpenter survey contended for by New Mexico be destroyed and obliterated.

The Twenty-fifth General Assembly of Colorado appropriated $15,000 for re-surveying and establishing the boundary line in accordance with the order of the Supreme Court. No appropriation has yet been made by New Mexico.

Pending.

In the Matter of the Application of the Colorado and Southern Railway Company for leave to abandon its line of road from Buena Vista to Romley.

Appeal from the decision of the Interstate Commerce Commission that the Railway Company had the right to abandon said railroad. The decision of the Supreme Court handed down May 3, 1926, sustained the ruling of the Interstate Commerce Commission.

State of Colorado v. Roger W. Toll.

An appeal from a decree of the United States District Court dismissing a bill for injunction brought by the State of Colorado to restrain the Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park.

Decree reversed by the Supreme Court, May 11, 1925.

Foster Cline, as District Attorney, v. Frink Dairy Company, et al.

An appeal from a decree of the United States District Court holding the Colorado Anti-Trust Law unconstitutional and restraining the District Attorney from conducting certain prosecutions under that law.

Pending.

People, ex rel. Spears v. State Board of Medical Examiners.

Appeal from a decision of the Supreme Court of Colorado sustaining the action of the Colorado State Board of Medical Examiners in revoking the license granted to Spears to practice medicine.

Pending.

CASE IN UNITED STATES CIRCUIT COURT OF APPEALS

Goldsmith, et al. vs. The Standard Chemical Co.

Appeal from judgment of United States District Court in favor of the Standard Chemical Co. for alleged excess taxes collected by Montrose County. Pending.

CASES IN THE UNITED STATES DISTRICT COURT

State of Colorado v. Roger W. Toll.

Bill for injunction to restrain Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park.

Case dismissed on application of the petitioner.

Bankers Life Insurance Company v. Cochrane.

Suit to recover alleged excess taxes in the sum of $4,213.06. Demurrer to complaint overruled September 15, 1926.

Pending.

The Holly Sugar Corporation v. Board of County Commissioners of Mesa County and the Colorado Tax Commission.

Suit to secure rebate of taxes.

Dismissed March 15, 1926.

The Holly Sugar Corporation v. Board of County Commissioners of Delta County and the Colorado Tax Commission.

Suit to recover rebate of taxes.

Judgment for plaintiff October 22, 1925.

The Greeley Transportation Company v. Otto Bock, et al.

Suit to enjoin interference by the Public Utilities Commission with the operations by the petitioner of a bus line. Temporary injunction granted September 22, 1925.

Pending.

J. Grant, et al. v. Otto Bock, et al.

Suit to enjoin interference by the Public Utilities Commission with operation of bus line by plaintiffs.

Pending on motion to dismiss.

The Beatrice Creamery Company v. Foster Cline as District Attorney.

Suit to enjoin the defendant as District Attorney from proceeding against the plaintiff under the Colorado Anti-Trust Law.

Permanent injunction granted November 14, 1926.

The Frink Dairy Company, et al. v. Foster Cline as District Attorney.

Suit to enjoin the defendant as District Attorney from proceeding against the plaintiff under the Colorado Anti-trust Law.

Permanent injunction granted November 14, 1926.

Case appealed to the United States Supreme Court and now pending there.

Industrial Commission of Colorado v. Fidelity and Deposit Company of Maryland and L. B. Bromfield, as Receiver of the Globe National Bank.

Bill of Interpleader to determine title to deposit made with the Industrial Commission.

Order entered releasing Industrial Commission from liability on August 13, 1926.

C. W. Le Master v. Boatright, et al.

Bill to enjoin defendants from prosecuting plaintiffs for violation of the statutes against gambling.

Temporary injunction denied.

Pending on answer of defendants.

William Driscoll, et al. v. State Board of Land Commissioners and The Texas Company.

Action to compel the State Land Board to issue a patent for land free from mineral reservation.

Pending.

The Standard Chemical Co. v. Goldsmith, et al.

Action to recover alleged excess taxes paid to Montrose County.

Judgment for plaintiff December 27, 1926.

The McPhee and McGinnity Company v. Industrial Commission.

Action to compel Industrial Commission to return to plaintiff a deposit made by the plaintiff. Motion to strike affirmative defense from answer sustained. Case settled and dismissed.

CASES BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 15072. Petition of the Colorado and Southern Railway Company for leave to abandon its road from Buena Vista to Romley.

From a decision in favor of the Railway Company an appeal was taken to the Supreme Court and the ruling of the Interstate Commerce Commission was sustained May 3, 1926.

No. 15079. The Hunter Mercantile Company vs. The American Railway Express Company, Public Utilities Commission of Colorado, interveners.

Order entered making examiner's report final January 27, 1926. Complaint dismissed.

No. 16614. State of Colorado and the The Public Utilities Commission vs. The A. T. & S. F. Ry. Co., et al.

For reduction of freight rates on potatoes. Pending.

No. 16613. State of Colorado and Public Utilities Commission vs. The A. T. & S. F. Ry. Co., et al.

For reduction of freight rates on cabbage. Pending.

No. 16294. State of Colorado and Public Utilities Commission vs. The Missouri Pacific Ry. Co., et al.

For reduction of grain rates from Colorado to Gulf and eastern points. Consolidated with No. 17000.

No. 17000. Rate Structure Investigation. Pending.

Ex Parte No. 87. Petition of western railroads for increase in freight revenues in western district.

Increase denied July 14, 1926.

CASES IN U. S. LAND OFFICE

Parker vs. State of Colorado and the United States.

Suit to determine whether certain school lands of the state are subject to recovery by the United States on the ground that they were known mineral lands. Pending.

No. 9531. United States vs. State of Colorado.

Action contesting title of Colorado to certain school lands on the ground that said lands were of known mineral character. Contest involves Sec. 36, T. 35 N., R. 8 W., N. M. P. M. Pending.

No. 9532. U. S. vs. The State of Colorado.

Action contesting title of Colorado to certain school lands on the ground that said lands were of known mineral character. Contest involves Sec. 36, T. 35 N., R. 9 W., N. M. P. M. Pending.

No. 9533. U. S. vs. State of Colorado.

Contest involving Lots 3 and 4, S½ NE¼, NW¼ NW¼ and S½ NW¼ and S½ Sec. 16 and all of Sec. 36, T. 35 N., R. 10 W., N. M. P. M. Pending.

No. 9534. U. S. vs. State of Colorado.

Contest involving Lots 1 to 8, NE¼ NW¼, N½ SE¼ and N½ SW¼ Sec. 16 and all of Sec. 36, T. 35 N., R. 11 W., N. M. P. M. Pending.

No. 9535. U. S. vs. State of Colorado.

Contest involving S½ Sec. 16 and all of Sec. 36, T. 35 N., R. 12 W., N. M. P. M. Pending.

No. 9536. U. S. vs. State of Colorado.

Contest involving Sec. 36, T. 35 N., R. 13 W., N. M. P. M. Pending.

No. 9537. U. S. vs. State of Colorado.

Contest involving Sec. 36, T. 35 N., R. 13 W., N. M. P. M. Pending.

No. 9528. U. S. vs. State of Colorado.

Contest involving Sec. 36, T. 34½ N., R. 9 W., N. M. P. M Pending.

CRIMINAL CASES IN SUPREME COURT OF COLORADO

No.	Title	Crime
10686	Lowe vs. People	Murder
10822	Polochio vs. People	Assault to Rape
10869	Taylor vs. People	Murder
11011	Waelchi vs. People	Assault to Rape
11015	Halfyard vs. People	Rape
11029	Magwire vs. People	Rape
11050	Davis vs. People	Murder
11053	Massantonio vs. People	Violating Liquor Law
11098	Whipp vs. People	Assault
11116	Briggs vs. People	Embezzlement
11134	Carnes vs. People	Murder
11174	Max vs. People	Murder by Abortion
11201	White and Miller vs. People	False Pretenses
11215	Roberts vs. People	Violating Liquor Law
11227	May vs. People	Violating Liquor Law
11248	Daugherty vs. People	Gambling
11255	Eachus vs. People	Horse Stealing
11274	Rhodes vs. People	Violating Liquor Law
11280	Moya vs. People	Rape
11287	Roll vs. People	Confidence Game
11298	Magee vs. People	Bigamy
11301	Hainline vs. People	Abortion
11305	Driggers vs. People	Non-support
11308	Lambert vs. People	Interfering with Headgates
11312	Schneider and Webber vs. People	Violating Liquor Law
11316	Staley vs. People	Possession of Liquor
11321	Hendricks vs. People	Murder
11331	Whitfield and Steele vs. People	False Pretenses
11337	Gizewski vs. People	Violating Liquor Law
11344	Lubardo vs. People	Violating Liquor Law
11353	People vs. Morgan	Violating Migratory Stock Law.
11369	Price vs. People	Embezzlement
11389	Isaacs vs. People	Short Check
11415	Ruff vs. People	Violating Still Law
11418	Schulz vs. People	Violating Still Law
11428	Moore vs. People	Accepting Bribe
11440	Blass vs. People	Assault to Murder
11469	Grippa vs. People	Rape
11471	Livingston vs. People	Forgery
11472	Bunker vs. People	Violating Still Law
11477	Shank vs. People	Murder
11483	Roark vs. People	Violating Still Law
11484	DeBell vs. People	Rape
11487	McClary vs. People	Violating Still Law
11503	Gavin and Flindt vs. People	Violating Still Law
11523	Johnson vs. People	Violating Still Law
11526	Paxton vs. People	Assault to Rape
11554	Rodriguez vs. People	Violating Still Law
11560	True vs. People	Assault
11585	Strong vs. People	Assault
11587	Colacino vs. People	Violating Liquor Law
11618	Conferti vs. People	Violating Liquor Law
11620	Dickson vs. People	Embezzlement
11627	Hartman vs. People	Gambling
11647	Abila vs. People	Murder
11671	Buschman vs. People	Violating Still Law
11705	Massie vs. People	Murder
11748	Fries vs. People	Violating Still Law

CRIMINAL CASES IN SUPREME COURT OF COLORADO

Supersedeas	Disposition
Denied	Affirmed March 2, 1925
Allowed	Affirmed February 2, 1925
Allowed	Affirmed June 11, 1925
Denied	Reversed in Part and Affirmed in part April 6, 1925
	Reversed June 1, 1925
Allowed	Reversed April 6, 1925
Allowed	Reversed June 22, 1925
Allowed	Affirmed June 1, 1925
Allowed	Reversed September 8, 1925
Denied	Affirmed February 2, 1925
	Affirmed June 1, 1925
Allowed	Affirmed October 19, 1925
Allowed	Reversed April 5, 1926
Allowed	Affirmed January 25, 1926
Denied	Affirmed June 1, 1925
Denied	Affirmed July 6, 1925
Denied	Affirmed June 1, 1925
Denied	Affirmed June 29, 1925
Allowed	Affirmed April 1, 1926
Denied	Affirmed February 1, 1926
Allowed	Affirmed April 12, 1926
Allowed	Dismissed
Allowed	Affirmed February 1, 1926
Denied	Affirmed December 16, 1925
Denied	Affirmed October 5, 1925
Allowed	Reversed September 14, 1925
Denied	Affirmed November 2, 1925
Allowed	Affirmed April 1, 1926
Denied	Affirmed October 5, 1925
Denied	Affirmed September 10, 1925
	Affirmed May 24, 1926
Denied	Affirmed November 2, 1925
Allowed	Reversed July 6, 1926
Denied	Affirmed December 28, 1925
Denied	Reversed December 28, 1925
Denied	Affirmed March 1, 1926
Allowed	Affirmed May 31, 1926
Denied	Affirmed March 1, 1926
Denied	Affirmed March 1, 1926
Allowed	Reversed February 15, 1926
	Affirmed May 31, 1926
Denied	Affirmed March 15, 1926
Denied	Affirmed March 1, 1926
Denied	Affirmed March 22, 1926
Denied	Affirmed March 15, 1926
Denied	Affirmed May 3, 1926
Denied	Affirmed April 19, 1926
Denied	Affirmed May 31, 1926
Denied	Affirmed April 19, 1926
Denied	Affirmed November 22, 1926
	Affirmed January 3, 1927
Denied	Affirmed July 6, 1926
Allowed	Pending
Denied	Affirmed December 13, 1926
Denied	Affirmed October 4, 1926
Denied	Affirmed October 4, 1926
Allowed	Pending
	Affirmed January 10 1927

CIVIL CASES IN THE SUPREME COURT OF COLORADO

No.

10790. Dieteman, Executor v. People of the State of Colorado.

Motion to tax costs against the State. Motion denied October 5, 1925.

10846. Stong v. Milliken and DeLochte.

Injunction. Appeal from District Court of Denver. (No. 84028). Reversed February 2, 1925.

10935. People v. James Pirie.

Action to restrain defendant from operating a public utility. Appealed from District Court of Clear Creek County. Injunction denied. Judgment of the District Court affirmed Dec. 7, 1925.

11127. The A. T. & S. F. Ry. Co. v. Public Utilities Com.

Appeal from ruling of Public Utilities Com. Order of Public Utilities affirmed March 2, 1925.

11066. Jackson Cochrane v. National Life Insurance Co.

Injunction. Appeal from ruling of District Court of Denver, (No. 85497). Judgment of District Court reversed, April 6, 1925.

11159. O. O. Fellows v. The Grand Junction Sugar Co.

Suit to recover alleged excessive taxes. Appeal from District Court, Mesa County. Judgment of District Court affirmed, Dec. 21, 1925.

10997. People, ex rel. Cruz v. Morley as District Judge.

Original proceeding to obtain a writ of prohibition. Rule to show cause discharged February 2, 1925.

11242. H. S. DeSollar v. Blauvelt, State Highway Engineer.

Appealed from District Court, No. 87801, petition for injunction to restrain the Highway Engineer from advertising for further bids under Ch. 98, S. L. 1919—providing for use of Colorado materials for public work. Judgment of District Court affirmed June 1, 1925.

11192. The People, ex rel. Attorney General v. Paul P. Newlon.

Appealed from District Court No. 87722, brought at the request of Governor to oust the defendant from the office of Adjutant General. Decision for defendant. Judgment of District Court affirmed June 15, 1925.

11249. The Strange-Maguire Paving Co. v. Blauvelt, Highway Engineer.

Suit arising under Ch. 98, S. L. 1919—Colorado materials Law. Appealed from District Court. Judgment of District Court affirmed, June 1, 1925.

No.

11276. William Clark, et al. v. The Denver Interurban R. R. Co. et al.

Appeal for Writ of Review of Order of Public Utilities Commission. Writ of Review dismissed, July 6, 1925.

11267. The People of the State of Colorado v. The Central Savings Bank & Trust Company.

Appealed from District Court, Logan County. Judgment of District Court affirmed June 1, 1925.

11286. Henry C. Davis v. The People (Motor Bus case).

Appeal from District Court of Mesa County. Judgment of District Court affirmed, July 6, 1926.

11338. Charles Davis as Auditor of State v. Ind. Com., ex rel. Gertrude A. Lee.

Mandamus to compel the payment of salary. Peremptory writ granted by District Court but judgment of District Court reversed Oct. 5. 1925.

11444. People, ex rel. Colorado Bar Association v. Samuel E. Cary.

Proceedings to disbar respondent.
Respondent disbarred Dec. 20, 1926.

11367. Greeley Transportation Co. v. People.

Appeal from an order of Denver District Court enjoining transportation company from operating bus line. Judgment affirmed April 19, 1926.

11376. Charles Davis v. The People, ex rel. Hyder.

Suit to compel payment of salary. Appealed from District Court (No. 90176). Judgment of District Court affirmed, Jan. 18, 1926.

11549. James Dalrymple as State Inspector of Coal Mines vs. Fred Sevcik.

Appeal from a judgment of the District Court of El Paso County restraining state coal mine inspector from enforcing coal mining laws as against the defendant. Judgment reversed November 29, 1926.

11555. Samuel W. Lee v. Clarence J. Morley, et al.

Mandamus to compel payment of salary. Judgment of District Court affirmed May 17, 1926.

11521. Charles Davis as Auditor of State v. Andrew Morley.

Suit to compel payment of salary as Purchasing Agent for the State Detention Home. Judgment of District Court, City and County of Denver, affirmed March 8, 1925.

No.

11690. Thomas R. Elkins v. Carl Milliken, et al.

Petition for review of the action of the Secretary of State in placing on ballot amendment for the repeal of civil service. Companion case to No. 11689. Judgment of District Court reversed Oct. 1, 1926.

11689. People, ex rel. Thomas R. Elkins v. Carl Milliken.

Injunction suit to enjoin placing of civil service repeal amendment on ballot. Judgment of District Court of City and County of Denver reversed October 1, 1926.

11692. Board of County Commissioners of Montezuma County and Colorado Tax Commission v. Cortez Land and Securities Company.

Action to secure refund of taxes. Appeal from District Court of Montezuma County. Pending.

11715. William V. Roberts, et al. v. James H. Duncan, et al.

Mandamus suit to compel payment of salary. Appeal from an order of the District Court, City and County of Denver, granting peremptory writ. Pending.

11649. People v. Gerald A. McCann.

Proceedings for disbarment. Respondent disbarred October 18, 1926.

11583. In the matter of the Estate of Edward Joyce.

Action to enforce claim of State Hospital for care and maintenance. Appeal from an order of the County Court of Weld County allowing a claim. Pending.

11325. State Board of Medical Examiners v. Leo Spears.

Appeal from an order of the District Court, City and County of Denver, setting aside the action of the State Board of Medical Examiners in revoking Spears' license to practice medicine. Judgment reversed June 7, 1926.

WORKMEN'S COMPENSATION CASES IN THE SUPREME COURT OF COLORADO

(All of the following are actions to set aside an award of the Industrial Commission).

No.	Title of Cause	Judgment of Lower Court	Status
11332	Frink Dairy Co. et al. vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11592	Lackey vs. Industrial Commission and Lawlor	Award Affirmed	Judgment Reversed
11593	Lackey vs. Industrial Commission and Jacks	Award Affirmed	Judgment Reversed
11414	Employers' Mutual Ins. Co. vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11364	Industrial Commission vs. Employers' Liability Ins. Co.	Award Set Aside	Judgment Reversed
11426	Armour and Co. vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11597	Young vs. Industrial Commission et al.	Award Affirmed	Pending
11498	Carlson vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11417	London G. and A. Co. vs. Industrial Commission	Award Affirmed	Judgment Reversed
11517	Newkirk vs. Industrial Commission et al.	Award Affirmed	Judgment Affirmed
11317	American Radiator Co. et al. vs. Industrial Commission	Award Affirmed	Pending
11624	State Compensation Insurance Fund vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11240	Industrial Commission vs. Continental Investment Co.	Award Set Aside	Judgment Reversed
11357	Industrial Commission vs. Bonfils et al.	Award Set Aside	Judgment Reversed
11282	Flick vs. Industrial Commission	Award Affirmed	Judgment Reversed
11123	Industrial Commission vs. Hammond	Award Set Aside	Judgment Reversed
11216	Hall vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11178	Industrial Commission vs. Globe Indemnity Co.	Award Set Aside	Judgment Reversed
11157	Kettering Mfg. Co. vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11166	Lindsay and Dolan vs. Industrial Commission	Award Affirmed	Judgment Affirmed
11275	Comstock et al. vs. Bivens et al.	Award Set Aside	Judgment Reversed
11449	Vaughn vs. Industrial Commission et al.	Award Affirmed	Judgment Affirmed
11586	Public Service Co. vs. Industrial Commission et al.	Award Affirmed	Judgment Affirmed
11599	Brady vs. Industrial Commission et al.	Award Affirmed	Judgment Affirmed
11613	London G. and A. Co. vs. Industrial Commission et al.	Award Affirmed	Judgment Reversed
11622	Industrial Commission et al. vs. Ahel	Award Set Aside	Judgment Reversed
11626	Aetna Life Ins. Co. et al. vs. Industrial Commission et al.	Award Affirmed	Pending
11713	Industrial Commission et al. vs. Enyeart	Award Set Aside	Pending
11702	Zuver vs. Industrial Commission et al.	Award Affirmed	Pending
11756	Industrial Commission et al. vs. Cornelius	Award Set Aside	Pending
11757	Industrial Commission et al. vs. Weaver	Award Set Aside	Pending

CIVIL CASES IN THE DISTRICT COURTS

Adams County

2197. People v. J. F. Marsh.
Suit to establish boundaries. Pending.

Boulder County

8444. State Highway Department v. Sara A. Wise, et al.
Condemnation suit. Judgment entered Feb. 12, 1926, that petitioner take possession on payment of verdict of $11,103.

8541. State Highway Department v. DeVissecher, et al.
Condemnation suit. Settled and dismissed.

Clear Creek County

E. M. Patrick v. County Commissioners.
Suit to recover taxes. Pending.

Conejos County

Elizabeth A. C. Horton v. Federal Fire and Marine Ins. Co., Jackson Cochrane, Garnishee.
Proceedings to attach deposit of Insurance Co. in hands of Insurance Commissioner. Pending.

Crowley County

756. Foster Lumber Co. v. L. H. Phelps, State Highway Department, County Commissioners and Maryland Casualty Co.
Suit to recover judgment for materials and supplies. Pending,

Delta County

2032. Mike Mingen v. Dalrymple, Coal Mine Inspector.
Suit to enjoin enforcement of Sections 3482 and 3552 of coal mining law. Injunction denied, suit dismissed Sept. 1, 1925.

Dolores County

570. The Rio Grande Lumber Co. v. County Commissioners.
Suit to recover taxes. Pending.

Douglas County

940. Waite Phillips v. County Commissioners and State Tax Commission.
Suit to recover taxes. Judgment for defendants, July 9, 1926.

994. Waite Phillips v. County Commissioners and State Tax Commission.
Suit to recover taxes. Judgment for defendants July 9, 1926.

1017. County Commissioners and State Highway Department v Louem C. Donley, et al.

Condemnation. Judgment for petitioner.

276. County Commissioners and State Highway Department v. George Cole Briscoe, et al.

Condemnation. Pending.

Denver County

85973. Susie M. Donavan v. State of Colorado, et al.

Suit to quiet title. Decree entered quieting title.

87801. DeSollar v. Blauvelt, State Highway Engineer.

Injunction. Judgment for defendants, March 11, 1925. Appealed to Supreme Court No. 11242. Judgment of District Court Affirmed June 1, 1925.

88174. In the matter of the Petition of Minnie Ryan for a writ of Habeas Corpus.

Writ dismissed Jan. 17, 1925.

87722. The People ex rel. Attorney General v. Paul P. Newlon.

Quo Warranto. Hearing Jan. 28. Decision for Defendant. Appealed to Supreme Court, No. 11192. Judgment of District Court affirmed, June 15, 1925.

87201. The Strange-Maguire Paving Co. v. L. D. Blauvelt, State Highway Engineer.

Mandamus to compel acceptance of bid. Judgment for respondent. Appealed to Supreme Court, No. 11249. Judgment affirmed June 1, 1925.

89215. The People, ex rel. Fertig v. Auditing Board of the State of Colorado, et al.

Mandamus. Peremptory writ issued June 23, 1925.

90176. The People, ex rel. Gertrude A. Lee v. Davis as State Auditor, et al.

Mandamus to compel payment of salary. Peremptory writ issued June 29, 1925. Appealed to Supreme Court, No. 11338. Judgment reversed October 6, 1925.

90302. Dora Lawlor v. H. A. LaMoure and others.

Petition for Writ of Habeas Corpus. Writ issued June 8, 1925.

90176. The People, ex rel. Annie P. Hyder v. Davis as Auditor.

Petition for writ of mandamus. Peremptory writ issued Aug. 27, 1925. Appealed to Supreme Court, No. 11376. Judgment affirmed Jan. 18, 1926.

91582. The People, ex rel. Mable Beatty v. John L. McMenimin and the State Home for Dependent Children.

Petition for Writ of Habeas Corpus. Writ discharged July 1, 1926.

92206. Andrew J. Morley v. Charles Davis as Auditor.

Petitioner for Mandamus to compel payment of salary. Peremptory writ granted Jan. 14, 1926. Appealed to Supreme Court, No. 11521. Judgment of District Court affirmed March 8, 1926.

91724. The Glen Investment Co. v. Clarence J. Morley, Governor, as Trustee for the State.

Suit to recover delinquent taxes on Armory site. Judgment for defendant.

28535. The People, ex rel. Rubin E. Rhodes v. Thos. J. Tynan as Warden of State Penitentiary.

Petition for Writ of Habeas Corpus. Writ quashed and dismissed, Feb. 2, 1926.

92687. Samuel W. Lee v. Clarence J. Morley, Charles Davis and W. D. MacGinnis.

Petition for Mandamus. Writ discharged, Feb. 25, 1926. Appealed to Supreme Court, No. 11555. Judgment of District Court affirmed, May 17, 1926.

92728. Thomas R. Elkins, et al. v. Charles Davis, as Auditor and Wm. D. MacGinnis, as State Treasurer.

Mandamus. Peremptory writ issued, Feb. 20, 1926.

92704. The People ex rel. Ralph M. Jones v. State Board of Health.

Petition of mandamus to compel recognition as member of State Board. Finding for plaintiff; peremptory writ issued Mar. 8, 1926.

93127. The Western Mutual Life Assn. v. Jackson Cochrane.

Mandamus to compel issuance of license. Peremptory writ issued Mar. 25, 1926.

93164. The People ex rel. Olmsted v. State Board of Health.

Petition of mandamus to compel recognition as member of State Board of Health. Peremptory writ issued April 5, 1926.

93981. M. J. Frazier v. State Board Stock Inspection Commissioners.

Petition for Mandamus to compel appointment as Chief Inspector. Judgment for respondents July 6, 1926.

92643. People, ex rel. Duncan v. Roberts, et al.

Mandamus to compel payment of salary. Peremptory writ issued Oct. 8, 1926. Appealed to Supreme Court.

95107. The People ex rel. City and County of Denver v. M. C. Hinderlider, as State Engineer.

Petition for mandamus to compel the filing, without payment of filing fees, of maps and plats. Writ made peremptory.

90120. People v. Greeley Transportation Company.

Injunction to restrain operation of bus line. Injunction granted. Case appealed to Supreme Court which affirmed judgment of District Court on April 19, 1926.

95052. People, ex rel. Thomas R. Elkins v. Carl S. Milliken, Secretary of State.

Application for injunction to restrain Secretary of State from placing civil service repeal amendment on ballot. Injunction denied. Case appealed to Supreme Court which reversed judgment of District Court, September 30, 1926.

95019. In the matter of the protest against petition to annex and amend to the Constitution of the State of Colorado repealing Section 13, Article 12 thereof which establishes the classified civil service.

Petition dismissed September 18, 1926. Case appealed to the Supreme Court which reversed judgment of the District Court, October 1, 1926.

9459. Edna May Robinson v. The State Industrial School for Girls, et al.

Application for writ of habeas corpus. Writ quashed August 3, 1926.

95267. People, ex rel. Pikes Peak Fuel Co. v. Public Utilities Commission, et al.

Petition for writ of prohibition. Petition denied.

57195. People v. R. G. D. Douglas, et al.

Proceeding by the State Board of Land Commissioners to obtain rent. Pending.

58263. State Board of Land Commissioners v. W. G. Linch, et al.

Action to secure back rent. Pending.

62192. State Board of Land Commissioners v. S. M. Moses.

Action to recover rent. Pending.

58726. State Board of Land Commissioners v. John Marlman.

Action to recover back rent. Pending.

58264. People v. Frank Welch, et al.

Action to recover rent. Pending.

61212. People v. Geo. Patrick.

Action for trespass. Pending.

60305. People v. Lee Witcher.

Action to recover rent. Pending

58606. People v. C. R. Birkins.

Action to recover possession of stock. Settled and dismissed.

92735. People v. Shield Oil Company.

Action to recover gasoline tax in the amount of $3,610.70. Amount paid in full and case dismissed.

89387. People v. Merchants Oil Company.

Action to recover gasoline tax in amount of $6,541.67. Defendant adjudicated bankrupt. Proof of claim filed in said Court for 1c tax of $1,331.73 due from defendant's predecessor in business, The Bell Service Company. Proof was filed for full amount of 2c tax and inspection fees, $6,638.23. On November 12, 1925, $4,805.53 was received from the trustee in bankruptcy as a first and final payment. The State's claim was allowed as preference in an amount exceeding the amount the trustee had for distribution of creditors. Defendant discharged as to balance of account by bankruptcy court.

91774. People v. The Robinson Service Corporation.

Suit to collect $404.19 gasoline tax. Judgment entered for amount sought.

91773. People v. The Royal Oil Company.

Suit to recover $4,448.88 gasoline tax. H. L. Lubers appointed receiver for defendant's property. Case still pending.

92462. People v. Denver Service Station Company. Action to recover $907.32 two cents gasoline tax and $2,197.14 one cent gasoline tax. Judgment in accordance with the prayer of complaint.

88885. People v. Fitzmorris, et al.

Suit to enjoin operation of bus line. Defendant stopped operating. Case dismissed.

88886. People v. M. J. Southard.

Suit to enjoin operation of bus line. Defendant stopped operating and case dismissed.

95022. People v. William J. Honeyman.

Suit to enjoin operation of bus line. Pending.

95023. People v. Ferrie and Dorman as the Western Transportation Company.

Suit to restrain operation of bus line. Pending.

95024. People v. Albert J. Herbertson.

Suit to restrain operation of bus line. Pending.

95025. People v. L. N. White.
Suit to restrain operation of bus line. Pending.

95026. People v. Tony Archer.
Suit to restrain operation of bus line. Pending.

95027. People v. F. G. Tiller.
Suit to restrain operation of bus line. Dismissed.

95028. People v. Midwest Transit Company.
Suit to restrain operation of bus line. Pending.

95144. People v. John Monett.
Suit to restrain operation of bus line. Pending.

88883. People v. A. T. Brundridge, et al.
Suit to restrain operation of bus line. Pending.

89479. People v. J. J. Ballard.
Action to recover rent. Pending.

Eagle County

County Commissioners and State Highway Department v. Charles Rush and others.
Condemnation suit. Pending.

El Paso County

14945. The People and The Public Utilities Commission v. L. B. King. (Motor Truck case.)
Suit to enjoin operation without certificate of public necessity. Injunction granted April 16, 1925.

15356. Sevcik v. James Dalrymple as State Coal Mine Inspector.
Suit to enjoin the enforcement of Secs. 3482 and 3558 of the coal mining law. Suit dismissed on motion of plaintiff, January 21, 1926.

15486. Sevcik v. James Dalrymple, as State Coal Mine Inspector.
Suit to enjoin the enforcement of law, as in No. 15356. Permanent injunction granted February 15, 1926. Appealed to Supreme Court, No. 11549.

People v. Nelson & Gideon, doing business as the Platte Cascade Filling Station.
Action to recover gasoline tax. Tax paid and suit dismissed.

Fremont County

The People ex rel. Sweet v. Thos. J. Tynan, as Warden of the State Penitentiary.
Action of mandamus to compel defendant to surrender office of warden of the penitentiary. Writ denied.

Jefferson County.

2622. The People of the State of Colorado v. Martin B. Monson.

Suit to enjoin interference with ditch of the State Home and Training School for Mental Defectives. Injunction denied, June 7, 1925.

2668. State Highway Department v. Jeanette E. Mullen, et al.

Condemnation suit. Judgment for petitioner entered April 7, 1926.

Larimer County

5232. People v. Starkey Filling Station, Inc.

Action to recover $10,263.51, one cent tax and $7,308.50 two cent gasoline tax. On December 5, 1925, receiver was appointed to take over and operate the business and property of defendant. About June 1, defendant was adjudicated a bankrupt and the bankruptcy proceedings are still pending. The trustee in bankruptcy has paid $4,000 to the State Inspector of Oils as a first dividend. Final dividend is expected before the end of 1926. The state's claim was given priority by the referee in bankruptcy.

Las Animas County

11179. People v. R. B. O'Brian doing business as the Liberty Oil Company.

Action to recover $4,486.10 gasoline tax. Paid in full and suit dismissed, Dec. 23, 1925.

Mesa County

People v. Henry C. Davis.

Action to enjoin operation of bus line. Injunction granted. Case appealed to the Supreme Court which affirmed judgment of the District Court.

Montezuma County

888. The Rio Grande Southern Lumber Co. v County Commissioners.

Suit to recover taxes. Pending.

906. Cortez Land & Securities Co. v. County Commissioners.

Suit for refund of taxes. Judgment for plaintiff entered July 1, 1926. Appealed to Supreme Court, No. 11692. Pending.

Phillips County

People v. E. L. Naman.

Criminal action against the defendant who is an agent of the Land Board, and arrested while acting under instruction of the Board. He was defended by the Attorney General's office and the action against him dismissed.

Pitkin County

2510. Castle Creek Water Company v. The Colorado Tax Commission.

Suit for refund of taxes. Settled and dismissed.

2511. The Roaring Fork Electric L. & P. Co. v. The Colorado Tax Commission.

Suit for refund of taxes. Settled and dismissed.

Pueblo County

People v. Alva Koontz.

Action to recover gasoline tax. Tax paid in part and case dismissed without prejudice as to unpaid portion.

Board of County Commissioners of Pueblo County v. State Board of Land Commissioners, et al.

Condemnation suit over state land. Pending.

Saguache County

People v. J. L. Jones, doing business as the Navy Gas and Supply Company.

Action to recover gasoline tax. Tax paid in full and case dismissed September 8, 1926.

Weld County

6602. J. M. B. Petriken v. County Commissioners and Colorado Tax Commission.

Suit for refund of taxes. Judgment for plaintiff.

WORKMEN'S COMPENSATION CASES IN THE DISTRICT COURTS OF COLORADO

Boulder County

8497. Cobb vs. Industrial Commission, et el.

Action to set aside an award of the Industrial Commission. Award affirmed.

Denver County

89576. Frink Dairy Co., et al. vs. Industrial Commission.

Action to set aside an award of the Industrial Commission. Appealed to Supreme Court and judgment affirmed.

J. Fred Roberts vs. J. Fred Roberts Construction Co.

Action to set aside an award. Award set aside and case remanded to Industrial Commission.

88196. Aetna Life Ins. Co. vs. Industrial Commission.

Action to set aside an award. Award affirmed.

90112. Employers' Mutual Ins. Co. vs. Industrial Commission.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11414.

Denver Tramway Co. vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed.

89078. Employers Liability Ins. Co. vs. Industrial Commission.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11364.

89374. Armour and Co. vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11426.

90356. Carlson vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11408.

90692. London G. and A. Co. vs. Keyes, et al.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11417.

87304. American Radiator Co., et al. vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11317.

90918. U. S. F. & G. Co. vs. Farrell, et al.

Action to set aside an award. Award affirmed.

91447. Industrial Commission vs. Federal Surety Co.

Action to recover penalty. Judgment for plaintiff for $100.00.

92039. London G. and A. Co. vs. Smith, et al.

Action to set aside an award. Award affirmed.

Sweeney vs. Red Feather Fox Farms.

Action to enforce an award. Judgment entered for plaintiff.

86566. State Compensation Ins. Fund vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11624.

88328. Continental Investment Co. vs. Industrial Commission, et al.

Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11240.

86209. Bonfils, et al. vs. Industrial Commission, et al.

Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11357.

88687. Flick vs. Industrial Commission.
Action to set aside an award. Award affirmed. Appealed tc Supreme Court, No. 11282.

Milton vs. General Metal Corporation.
Action to enforce an award. Judgment entered for plaintiff.

88332. Kimsey vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed.

Hall vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11216.

86072. Globe Indemnity Co. vs. Industrial Commission, et al.
Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11178.

87064. Kettering Mfg. Co. vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11157.

86946. Lindsay and Dolan vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11166.

87079. Vaughn vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11449.

92189. J. Fred Roberts vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed.

92132. Tolliver & Kinney Mercantile Co., vs. Industrial Commission.
Action to set aside an award. Award affirmed.

91596. Public Service Co. vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11586.

92702. London G. and A. Co., vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11613.

93453. Ahel vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11622.

90291. Colorado Fuel & Iron Co. vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed.

91403. Colorado Fuel & Iron Co. vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed.

93471. Aetna Life Ins. Co., et al. vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11626.

93757. Enyeart vs. Industrial Commission et al.
Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11713.

93811. New York Indemnity Co. vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed.

94395. Industrial Commission vs. Flood Market Co.
Action to recover a penalty. Pending.

94511. Industrial Commission vs. Lumbermen's Mutual Casualty Co.
Action to recover a penalty. Case settled and dismissed.

94752. Zuver vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11702.

95073. Continental Investment Co. vs. Industrial Commission, et al.
Action to set aside an award. Pending.

94976. Index Mines Corporation vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed.

93779. Hover & Co. vs. Industrial Commission, et al.
Action to set aside an award. Pending.

Eagle County

Industrial Commission vs. Petrin.
Action to recover a penalty. Settled and dismissed.

El Paso County

Newkirk vs. Industrial Commission, et al.
Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11517.

Fremont County

Coursey vs. Industrial Commission, et al.
Action to set aside an award. Award set aside and case remanded to the Industrial Commission.

Coursey vs. Industrial Commission, et al.
Mandamus to compel Industrial Commission to enforce payment of an award. Judgment for defendants.

Grand County

Industrial Commission vs. W. H. Wood.

Action to recover a penalty. Pending.

Gunnison County

1766. Webber and Chapman vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed.

Huerfano County

Sirola vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed.

Jefferson County

Industrial Commission vs. H. J. Popp.

Action to recover a penalty. Pending.

Las Animas County

Malouff vs. Industrial Commission, et al.

Action to set aside an award. Dismissed on application of the plaintiff.

Montrose County

Bivens, et al. vs. Comstock, et al.

Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11275.

Otero County

Lackey vs. Industrial Commission and Lawlor.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11592.

Lackey vs. Industrial Commission and Jacks.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11593.

Pueblo County

Young vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11597.

Brady vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed. Appealed to Supreme Court, No. 11599.

Industrial Commission vs. Turkey Creek Stone, Clay and Gypsum Co.

Action to recover a penalty. Settled and dismissed

Saguache County

Hammond vs. Industrial Commission, et al.

Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11123.

San Miguel County

Cornelius vs. Industrial Commission, et al.

Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11756.

Weaver vs. Industrial Commission, et al.

Action to set aside an award. Award set aside. Appealed to Supreme Court, No. 11757.

Teller County

Crowder, et al., vs. Industrial Commission, et al.

Action to set aside an award. Award affirmed.

CIVIL CASES IN COUNTY COURTS

Denver County

In the matter of the estate of William H. Light, deceased.

Claim of State Hospital for care and maintenance of insane person.

El Paso County

In the matter of the estate of Emma Swanson, insane.

Claim of State Hospital for $1,729.16. Claim allowed April 7, 1925.

Kiowa County

State Board of Land Commissioners vs. Estate of Milton Morgan, et al.

Proceedings for foreclosure of state loan. Dismissed.

Phillips County

Foster Lumber Company vs. State Board of Land Commissioners, et al.

Action to foreclose mechanic's lien against improvements on state land. Pending.

Weld County

In the matter of the estate of Edward Joyce, insane.

Claim of State Hospital for care and maintenance in the amount of $4,985.91. Claim allowed. Case appealed to the Supreme Court. Pending.

ESCHEAT CASES AND PROBATE CASES—COUNTY COURTS

Boulder County

Estate of John Lane.

Application for order on State Treasurer to pay out certain moneys. Granted May 9, 1925.

Estate of Nicholas Stoloroff.

Application for order on State Treasurer to pay out certain moneys. Granted October 17, 1925.

Estate of William Corbett.

Application for order on State Treasurer to pay out certain moneys. Granted November 7, 1925.

Estate of Maggie Stolns.

Petition for repayment filed December 15, 1926. Pending.

Costilla County

Estate of George Francis Daly.

Application for order on State Treasurer to pay out certain moneys. Granted April 28, 1925.

Denver County

Estate of Frank Bohlman.

Application for order on State Treasurer to pay out certain moneys. Granted October 5, 1925.

Estate of Eliza E. Lewis.

Application for order on State Treasurer to pay out certain moneys. Granted January 26, 1926.

Estate of George Berstein.

Application for order on State Treasurer to pay out certain moneys. Granted November 19, 1925.

Estate of Robert Austin Peterson.

Application for order on State Treasurer to pay out certain moneys. Granted January 25, 1926.

Estate of Julian H. Ward.

Application for order on State Treasurer to pay out certain moneys. Granted.

Estate of Irene Barbier.

Application for order on State Treasurer to pay out certain moneys. Granted July 29, 1926.

Estate of Annie Marsh.

Funds of the estate paid into State Treasury July 23, 1926.

Estate of George Wilson.

Application for order on State Treasurer to pay out certain moneys. Granted August 25, 1926.

Estate of Maria Butcher.

Application for order on State Treasurer to pay out certain moneys. Granted October 15, 1926.

Estate of Lillian B. Stringfellow.

Report of administrator filed and money paid into State Treasury.

Douglas County

Estate of Tom Johnson.

Notice of application for an order on State Treasurer to pay out certain moneys. Pending.

Eagle County

Estate of William Paschal.

Application for order on State Treasurer to pay out certain moneys. Granted.

El Paso County

Estate of Conrad Loesch.

Funds of the estate paid into State Treasury on order of court April 28, 1926.

Estate of James A. Mundy.

Application for order on State Treasurer to pay out certain moneys. Pending.

Estate of Jackson Ford.

Funds of the estate paid into State Treasury on order of court June 24, 1925.

Fremont County

Estate of B. H. Terrell.

Application for order on State Treasurer to pay out certain moneys. Granted September 2, 1926.

Garfield County

Estate of Scott McCreery.

Funds of the estate paid into State Treasury February 16, 1925.

Jefferson County

Estate of Flora Pruyn.

Application for order on State Treasurer to pay out certain moneys. Granted January 16, 1926.

Larimer County

Estate of Hoken Anderson.

Application of certain heirs for repayment. Pending.

Las Animas County

Estate of Aaron E. Beal.

Petitions of various alleged heirs for an order on the State Treasurer to pay out certain moneys. All petitions granted May 20, 1925.

Lincoln County

Estate of Henry Ward.

Application for order on State Treasurer to pay out certain moneys. Granted August 18, 1926.

Park County

Estate of Chas. Davis.

Funds of the estate paid into State Treasury December 5, 1925.

Pueblo County

Estate of Jacob Siegesen.

Funds of the estate paid into State Treasury October 21, 1926.

CASES IN JUSTICE OF THE PEACE COURTS

Conejos County

People vs. Ruyval.

Action of forcible entry and detainer to recover possession of state land. Pending.

Weld County

People vs. Norvenger.

Prosecution for violation of the game laws. Defendant acquitted.

People vs. Ball.

Prosecution for violation of the game laws. Defendant acquitted.

RECAPITULATION

In the Supreme Court of the United States—Cases pending, 3; cases disposed of, 2; total, 5.

In the United States Circuit Court of Appeals—Cases pending, 1; cases disposed of, 0; total, 1.

In the United States District Court—Cases pending, 5; cases disposed of, 8; total, 13.

Before the Interstate Commerce Commission—Cases pending, 3; cases disposed of, 4; total, 7.

Before the United States Land Office—Cases pending, 9; cases disposed of, 0; total, 9.

Criminal cases in the Colorado Supreme Court—Cases pending, 4; cases disposed of, 54; total, 58.

Civil cases in the Colorado Supreme Court—Cases pending, 3; cases disposed of, 23; total, 26.

Workmen's Compensation cases in Colorado Supreme Court—Cases pending, 7; cases disposed of, 24; total, 31.

Civil cases in District Courts—Cases pending, 27; cases disposed of, 56; total, 83.

Workmen's Compensation cases in District Courts—Cases pending, 5; cases disposed of, 56; total, 61.

Civil cases in County Courts—Cases pending, 2; cases disposed of, 3; total, 5.

Escheat and Probate cases in County Courts—Cases pending, 2; cases disposed of, 26; total, 28.

Cases in Justice of the Peace Courts—Cases pending, 1; cases disposed of, 2; total, 3.

Total number of cases pending in all courts 72

Total number of cases disposed of in all courts 258

Total number of cases handled during the biennial period 330

SCHEDULE III

OPINIONS AND SYLLABI OF OPINIONS

RENDERED DURING THE BIENNIAL PERIOD 1925-1926

Note: These syllabi and opinions are reported in the chronological order of the dates on which the opinions were rendered. A copy of each opinion is on file under a number corresponding with that of the syllabus.

OPINIONS AND SYLLABI OF OPINIONS

1. OFFICERS

To Clarence J. Morley, Governor, Jan. 16, 1925.

Adjutant General.

While the Adjutant General may perform duties of both civil and military nature, yet both duties must be performed by the one individual who derives his power by virtue of his office as Adjutant General.

An order relieving him of his duties as Civil Adjutant General is, in effect, an order relieving him as Adjutant General. His military duties must necessarily be subordinate to his civil duties.

See, however, People ex rel. v. Newlon, 77 Colo. 516.

2. CIVIL SERVICE

To Civil Service Commission, Jan. 22, 1925.

The constitutional amendment establishing Civil Service supersedes all *statutes* fixing qualifications of state officers. Qualifications for appointments should be determined by the Commission.

3. ATTORNEY GENERAL

The Legislature is without power to make provision for legal service to any department of the State Government outside of the office of the Attorney General. All legal duties of the State are to be performed by the Attorney General and any attempt to divest his office of these duties would be unconstitutional and void.

To Senator L. A. Puffer, January 22, 1925.

Dear Sir:

Pursuant to oral request of your Committee for an opinion as to the authority of a branch of the Executive Department of the State to employ counsel to advise the Department or to appear and act for the Department, you are advised that *Article IV, Section 1,* of the Constitution of the State of Colorado, provides for the office of Attorney General.

The duties of the Attorney General are not defined by the Constitution but have been defined by the Supreme Court of the State of Illinois, under a constitutional provision identically the same as in the Constitution of the State of Colorado, that the Attorney General has all the powers, functions and duties of the office as known at common law and is the chief law officer of the State and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest; that he is the sole official adviser of the executive officers and all the boards, commissions and departments of the State Government; that it is his duty to conduct the law business of the

State, both in and out of the courts. (Fergus v. Russel, 270 Ill. 304, at pages 335 to 344.)

This view of the duties of the Attorney General was adopted by the Supreme Court of this State in *People v. Casias*, 73 Colo. 420. The Legislature is without power to make provisions for legal service to any department of the State Government outside of the office of the Attorney General and such an act of the Legislature of the State of Illinois was held unconstitutional in the case of *Fergus v. Russell, Supra.*

The conclusion is inevitable that all legal duties of the State are to be performed by the Attorney General and any attempt to divest his office of these duties in any Executive Department of the State would be unconstitutional and void.

Yours very truly,

WILLIAM L. BOATRIGHT,
Attorney General.

By S. E. NAUGLE
Assistant Attorney General.

4. OFFICERS

To Sterling B. Lacy, Lieut Governor, Jan. 26, 1925.

The offices of Lieutenant Governor and Member of Board of Commissioners of Home for Mental Defectives are incompatible in law.

5. CIVIL SERVICE

To Civil Service Commission, Jan. 26, 1925.

Hearing upon charges filed against persons in the classified civil service, should be conducted by the Commission rather than by any board or body appointed by the Commission.

6. SCHOOLS

To David S. Boyd, Representative, Jan. 27, 1925.

A statute prohibiting school directors from maintaining a school where there were less than a specified number of pupils in the district, would be unconstitutional.

7. SCHOOLS

To J. O. Browder, House of Representatives, Jan. 28, 1925.

A statute requiring school boards to pay the tuition of pupils in another district would be unconstitutional.

8. APPROPRIATIONS

To Senator MacFadzean, January 28, 1925.

The General Appropriation Bill may properly include an appropriation for the Law Enforcement Fund provided for by

Sec. 3723, C. L. 1921, and also appropriations for what are regarded as executive, legislative and judicial departments.

9. OFFICERS

The State can safely pay the salary of the office to a de facto member of the Civil Service Commission.

To Hon. Charles Davis, Auditor of State, January 30, 1925.

Dear Sir:

Your letter of the 19th inst., quoting the letter of the 14th inst., addressed to you by Judge H. A. Hicks and having reference to salary of the office of a member of the State Civil Service Commission now in controversy, is at hand.

The question you ask concerns the course to be pursued by your office with reference to payment of salary pending the decision of the courts in the *quo warranto* suit brought by Judge Hicks against William V. Roberts for the purpose of ousting Mr. Roberts as such Commissioner.

The facts are substantially as follows:

Prior to December 26, 1924, Roberts was serving as a member of the Commission pursuant to his appointment thereto by Governor Shoup about four years ago for a term of six years. On the date mentioned, Governor Sweet issued an executive order purporting to remove Roberts from office and appointing Judge Hicks to fill the vacancy so created or attempted to be created and thereafter, by direction of the Governor, Roberts was forcibly removed from the rooms occupied by him as a member of the Commission. Thereupon, Roberts brought an injunction suit against Judge Hicks to procure his reinstatement in the office. Judge Butler of the Denver District Court awarded a temporary injunction restoring Roberts to the office, holding that Roberts had color of title thereto and could only be removed from office by the judgment of a Court in a proper legal proceeding. This injunction is still in force and effect and Mr. Roberts is exercising the duties of the office in question. Beyond question, therefore, Roberts is the *de facto* incumbent of the office.

Our Courts have repeatedly laid down two rules of law, the application of which affords the answer to your question. They have held that where the State pays the salary of an office to the *de facto* incumbent thereof, the State is relieved from further liability on account of such salary even though it should afterwards develop that the *de facto* incumbent did not have the legal title to the office. (See *Henderson v. Glynn*, 2 Colo. Appeals 303; *El Paso County v. Rhode*, 41 Colo. 258; *Thompson v Denver*, 61 Colo. 470.)

Our Courts have also held that a *de facto* officer may by suit require the payment of his salary even though he has no legal title to the office. *County Commissioners v. Wheeler*, 39 Colo. 207; *County Commissioners v. McLean*, 50 Colo. 602; *Haynes v. County Commissioners*, 66 Colo. 397.

In *Drach v. Leckenby*, 64 Colo. 546, the Court held that a *de facto* officer could not maintain a suit to recover his salary if the *de jure* officer had already established his title in a *quo warranto* suit.

In *Farr v. Neeley*, 66 Colo. 70, the Court held that where a *de facto* officer had collected the fees of the office, the *de jure* officer could maintain a suit against him for the fees thus collected.

Should Judge Hicks, therefore, establish his title to the office, he could call upon Mr. Roberts to account for any salary collected by him after the date of the order purporting to remove him from office.

It would, no doubt, be eminently proper that the salary of this office pending the controversy over title thereto be allowed to remain unpaid since it might turn out that Mr. Roberts would be required to account to Judge Hicks for salary accrued since the order of Governor Sweet was made. Yet I am obliged to advise you that under the above decisions, the State could safely pay the salary to Roberts as the *de facto* officer and that Mr. Roberts could probably maintain a suit to compel payment thereof.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy.

10. OFFICERS

To Charles Davis, Auditor, Jan. 31, 1925.

Colonel Newlon holds possession of the office of Adjutant General under color of title and performs the duties thereof. He is therefore the *de facto* officer and his acts as such are valid and entitled to be so recognized, and to have his salary as such officer.

11. MOTOR VEHICLES

To Carl S. Milliken, Secretary of State, Feb. 2, 1925.

When the County Clerk and Recorder, acting as agent for the Secretary of State, in accordance with the provisions of the Motor Vehicle Law is required to register a motor vehicle, he is entitled to compensation.

In other words, compensation follows registration.

12. PENITENTIARY

Records

To F. S. Hoag, Feb. 3, 1925.

The records at the State Penitentiary are in the control and under the supervision of the Colorado Board of Corrections and can be inspected only by consent of the board and under such regulation as may be prescribed by the board.

13. CIVIL SERVICE

To the Civil Service Commission, Feb. 10, 1925.

The legislature is directed by the Civil Service Amendment to make adequate appropriations to carry out the purposes of the amendment. Whether the legislature has made adequate appropriation in any particular instance is a question of fact for the courts to determine rather than for the Attorney General's office to pass upon.

The Auditor and Treasurer are under heavy bond and they should not be advised to pay warrants in excess of appropriations made by law, until the courts have passed upon the question.

14. TAXATION

To Frank H. Wolcott, Feb. 18, 1925.

While the State University is exempt from taxation on any stock which it holds in the corporation referred to, the property of the corporation is subject to taxation in its entirety.

15. CORPORATIONS

The issuance by any corporation in this State in payment for services or wages of checks containing an endorsement restricting the payment of such checks to the store of such company is illegal.

To Thomas Annear, Feb. 18, 1925.

Dear Sir:

We are in receipt of a letter from the Guaranty State Bank of Walsenburg to the Industrial Commission relative to one of the mining companies in their vicinity issuing regular checks but restricting payment of the same to the company's store.

It is our opinion that such restriction endorsed upon a check is forbidden by the statutes of this State.

Section 4234, C. L. 1921, declares: "It shall be unlawful for any person, company or corporation * * * to use or employ, as a system, directly or indirectly, the Truck System * * *"

Section 4236, C. L. 1921, states: "Any truck order, scrip or other writing whatsoever, made, issued, or used in aid of or in furtherance of, or as a part of, the Truck System * * * shall be utterly void * * *"

Section 4235, C. L. 1921, defines a Truck System to be "Any agreement, method, means or understanding used or employed by an employer, directly or indirectly, to require his employe to waive the payment of his wages in lawful money of the United States, and to take the same, or any part thereof, in goods, wares or merchandise, belonging to the employer or any other person or corporation". This section has five paragraphs which further define the so-called Truck System.

We believe that the issuance of these checks with the endorsement thereon restricting payment to the company's store, is, if not a direct, an indirect use of the Truck System by said company, and these checks are not only void but the act of issuing them is absolutely illegal.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
By JOHN F. REYNES,
Assistant.

16. UNIVERSITY OF COLORADO

Senate Bill No. 113 of the 25th General Assembly authorizing a loan of school funds to the State University for the construction of dormitories is unconstitutional.

To Dr. George Norlin, Feb. 28, 1925.

Dear Sir:

You have verbally requested the opinion of this office as to the constitutionality of Senate Bill No. 113, now pending in the General Assembly.

This bill authorizes and directs the State Board of Land Commissioners to loan "to the Regents of the University of Colorado" the sum of $500,000 for the erection of dormitories "upon land belonging to the Regents" for the use of students attending the University. Such loan is to be made from the permanent funds arising from the school lands of the State, and is to be repaid within a period of not exceeding thirty-five years and to bear interest at the rate of not to exceed five per centum per annum. Interest and principal are to be paid from the proceeds arising from the operation of the dormitories to be constructed, "or from other funds if this income shall be insufficient", and the Regents are authorized to guarantee the repayment of the principal "upon such terms and conditions as may be mutually agreed between the Land Board and the Regents". Such repayment is to be guaranteed "from the proceeds of the dormitories and from other funds which the Regents shall provide for that purpose in the event that the income from the dormitories shall not be sufficient to pay the principal." The Regents are required to apply the proceeds of the dormitories "to the payment of interest and the amortization of the principal".

The bill further provides that moneys so loaned by the Land Board "shall be a first lien upon the buildings constructed by the Regents" with such funds, and that such lien shall also extend to the ground upon which the buildings are erected.

The State University is an agency of the State, and it follows that money borrowed by the Regents of the University in their corporate capacity is money borrowed by the State.

Section 3, Article XI, of the State Constitution provides that:

> "The State shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue, erect public buildings for the use of the State * * * and the debt incurred in any one year for the erection of public buildings shall not exceed one-half mill on each dollar of said valuation; and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in Section 5 of this Article) * * *"

Section 5 of the same Article provides:

> "A debt for the purpose of erecting public buildings may be created by law as provided for in Section 4 of this Article, not exceeding in the aggregate three mills on each dollar of said valuation; Provided, That before going into effect, such law shall be ratified by the vote of a majority of such qualified electors of the State as shall vote thereon at a general election under such regulations as the general assembly may prescribe."

It is doubtful whether the proposed dormitories would be "public buildings" within the meaning of these sections; but, granting that they are public buildings, it follows from these sections that a debt for their construction could not be incurred in excess of fifty thousand dollars unless the act were ratified by the people at a general election, as provided in Section 5.

If the proposed dormitories were to be paid for wholly out of the income therefrom, and not out of moneys to be raised by taxation, it is possible that the proposed loan would not be a debt of the State within the meaning of the sections quoted. See *In re Canal Certificates,* 19 Colo. 63.

But this bill contemplates that the proposed debt shall be repaid from other funds in the event the income from the dormitories should prove insufficient. Presumably, "the other funds" would have to be raised by public taxation, and it follows that the proposed debt would be a debt against the State within the meaning of the sections quoted.

Section 4 of Article XI provides that:

> "In no case shall any debt above mentioned in this article be created except by a law *which shall be irrepealable* until the indebtedness therein provided for shall have been fully paid or discharged; *such law shall specify the purposes* to which the funds so raised shall be applied, *and provide for the levy* of a tax sufficient to pay the interest on and extinguish the principal of such debt within the time limited by such law for the payment thereof, which, in the case of debts contracted for the erection of

public buildings. * * * shall not be less than ten nor more than fifteen years. * * *"

Yet this bill provides for no tax levy for the discharge of the debt to be created and authorizes a loan to extend far beyond the constitutional limit of fifteen years. Moreover, it must be remembered that the school lands of the State, and the proceeds thereof, constitute under the Enabling Act a trust estate expressly dedicated "for the support of the common schools". (Compiled Laws 1921, page 32.)

In recognition of the character of that trust estate, our Constitution declares, in Section 3, Article IX, that:

> "The public school fund of the State shall forever remain inviolate and intact; the interest thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the State, in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated, except as herein provided. The State Treasurer shall be the custodian of this fund, and the same shall be *securely* and profitably invested as may be by law directed. The State shall supply all losses thereof that may in any manner occur."

The General Assembly has heretofore designated the securities in which the permanent school fund may be invested (See Sec. 8298, C. L. 1921, and Ch. 167, S. L. 1923), and doubtless it has wide discretion in that regard; but such discretion has been held subject to review by the courts.

The security proposed by this bill is:

1. "The income from the dormitories."

Whether that means *net* income or *gross* income is not stated in the bill.

2. The guaranty of the Regents to repay such loan "from other funds which the Regents shall provide for that purpose" if necessary.

The bill does not designate from what source such other funds shall be derived, and I, therefore, assume that they are to be derived from taxation, either under the existing mill levies for the institution or under some other levy to be hereafter imposed. If that is the intent of the bill, then it, of course, follows that such funds would not be available to make good the guaranty of the Regents unless the General Assembly shall see fit in the future to continue the existing levies for the institution or to make a new one in sufficient amount to take care of the proposed indebtedness. In other words, there now is no sure source of future revenue from taxation to make good any such guaranty.

3. Such security would also consist of a first lien upon the dormitories and grounds.

It is generally considered, I take it, that a real estate loan, to be rated as *secure*, should not exceed 50% or 60% of the market value of the security. In fact, our present statute limits farm loans of school funds to one-third of the appraised value of the land. But this bill contemplates that the loan shall equal the entire cost of the dormitories, and the only additional real estate security would be the ground upon which they are to stand.

It is, in my opinion, doubtful if the courts would hold such a loan to be a secure investment within the meaning of the Constitution.

In 1893, the State Senate requested an opinion of the Supreme Court as to the constitutionality of a pending bill providing for the loan of $650,000 of the Public School Permanent Fund "to the General Revenue Funds of 1887, 1888, and 1889". That bill provided that the loan should be repaid from the *excess revenues* for the year 1892 and subsequent years.

In declaring the bill unconstitutional, the Court, in *In Re Loan of School Fund*, 18 Colo. 199, said:

> "It may in some cases be difficult to determine in advance whether a proposed investment of the school fund will be secure as well as profitable. In general, legislation respecting such matters must be left to the wisdom and discretion of the General Assembly and of the chief executive of the State. But in this case, there would seem to be no room for a difference of opinion. By the terms of the bill submitted, it is proposed to loan $650,000 of the Public School Fund to the general revenue funds of 1887, 1888 and 1889. The bill provides for the repayment of such loan out of the "excess revenues for the years 1892 and subsequent years and not otherwise appropriated". But no certain amount or definite portion of the revenues of 1892, or any subsequent year, is set apart for the payment of such loan; no guaranty or assurance is given that there will be any excess revenue for 1892 or any subsequent year; and no other means of repayment is provided."

And further, on page 200:

> "If the public school funds of the state, or any part thereof, are to be invested in state warrants, the investment should be in warrants of unquestionable validity—in warrants based upon constitutional appropriations—in warrants the payment of which has been provided for with the greatest certainty. A loan of the Public School Fund to be repaid out of *contingent* or *doubtful* future revenues, as provided in the bill submitted, cannot be considered as "securely invested" and would, therefore, be without constitutional sanction."

But, aside from the question of the adequacy of the security, I think this bill would be held unconstitutional, even though ratified by the people, for the reason that it provides no tax levy, as required by Section 4, Article XI, to extinguish the proposed debt.

Pursuant to your request, I have furnished a copy of this opinion to Senator L. A. Puffer, Senator John McFadzean, and, as a matter of courtesy, to Senator McCaslin, who introduced the bill.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy.

17. SCHOOLS

To Rose Bishop, March 4, 1925.

An irregularity in the call for an election would not render the election invalid.

18. SCHOOLS

Segregation of Pupils

G. Thurston Maltby, March 5, 1925.

A school board cannot set apart a separate school building for Mexican pupils.

19. SCHOOL LANDS

A statute requiring the State Board of Land Commissioners to give holders of patents or certificates of purchase of public lands 20% of the royalties received from reserved mineral rights, would be invalid as to outstanding patents or certificates.

To Hon. Raymond Miller, March 5, 1925.

Dear Mr. Miller:

You have requested the opinion of this office upon House Bill No. 415, entitled, "A Bill for An Act to Amend Section 18 of Chapter 187 of the Session Laws of Colorado of 1919," now pending in the Twenty-fifth General Assembly, and also upon Senate Bill No. 318, now pending, and which is identical with the House Bill above mentioned.

These bills are to amend Section 18 of Chapter 187 S. L. 1919, which section is the same as Section 1171 Compiled Laws of 1921. The proposed amendment differs from the section as it now stands in that it seeks to add the following proviso not found in the original section, viz.:

> "Provided further, that in any case where the State Board of Land Commissioners has reserved to the State, in the advertisement and sale of any state or school lands, as hereinbefore in this section provided, all minerals,

ores and metals and all coal, asphaltum, oil, gas or other like substances in or under such land, and there shall be granted by the State Board of Land Commissioners to another a lease for the mining or extraction of any of such minerals or substances, the purchaser of such land (all payments due thereon to the State having been made) shall be entitled to one-fifth of all royalties received by the State under such lease."

I beg to advise you that this amendment would be unconstitutional as applied to patents or certificates of purchase issued prior to the effective date of the proposed amendment, for reasons similar to those set forth in our letter of this date bearing upon the constitutionality of Senate Bill No. 368.

The effect of this amendment as applied to patents and certificates already outstanding would be to give to the owner of the patent or certificate a valuable property right without any additional consideration. That is to say, these patentees and certificate holders purchased only the surface rights, yet the amendment proposes to make them a gift of a fifth interest, in substance, of the mineral, coal and oil rights reserved to the State. I do not think it is within the province of the General Assembly to give away valuable property rights of the State, even though it should be disposed so to do.

In *In Re State Lands,* 18 Colo. 365, the Supreme Court said:

> "It is not to be inferred from this that all legislation upon the subject would be binding upon the State Board. Should the legislature, under the guise of regulations, attempt to take away all power of disposition of the state lands from the State Board, or should laws be enacted for the *manifest purpose of favoring other than the highest bidder, such acts would be manifestly in violation of the constitution, and void.*"

I am not prepared to say that the proposed amendment as applied to sales made and certificates issued *after* it went into effect would be unconstitutional, and the question of its wisdom or propriety is of course one for the consideration of the General Assembly and the Governor, rather than of this office. It will be pointed out, however, that the effect of the amendment—even if limited to sales of land made after its effective date—would be to force your Board into what would amount to a sort of leasing partnership between your Board and the owner of the surface rights in all cases where your Board should find occasion to enter into leases for the mining or extraction of the minerals, coal, oil, etc., reserved to the State.

Cases might arise where the proportion of the royalties that would become due to the surface owner under this amendment would amount to far more than the certificate holder or patentee had paid for the surface rights. Of course, this prospective

royalty interest might in some cases enhance the selling value of the surface rights to the advantage of your Board, but whether that enhanced value would in the long run equal or exceed the royalties that would have to be paid to the surface holder in some instances is a matter of speculation, and it might be that the courts would hold that legislation of this kind is an unwarranted encroachment upon the powers of your Board as set forth in Section 10 of Article IX of the State Constitution, even though the amendment were made applicable only to future sales.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

20. SCHOOL LANDS

A statute providing that where the State Board of Land Commissioners has, without statutory authority, sold lands with a reservation to the State of minerals therein, the purchaser shall have the right to purchase the reserved rights at their value at the time when the certificate of purchase was issued, would be unconstitutional.

To Raymond Miller, President of the State Board of Land Commissioners, March 5, 1925.

Dear Mr. Miller:

You have requested the opinion of this office upon the constitutionality of Senate Bill No. 368, entitled, "A Bill for An Act Concerning State Lands and Validating Sales Thereof in Case Where There Has Been Reservation of Rights to Minerals, Ores, Metals, Coal, Asphaltum, Oil, Gas and Other Like Substances."

Section 1 of the bill validates sales of state or school lands made subsequent to April 19, 1917, which were offered and advertised subject to a reservation in favor of the State to the minerals, coal, oil, etc., therein contained.

Section 2 gives the purchaser of the surface rights a preference right for three years after the passage of the bill to purchase the minerals, coal, oil, etc., reserved to the State in any patent or certificate of purchase.

Section 3 provides that where any such reservations have been made in any such patent or certificate of purchase, the Land Board shall cause the reserved rights to be appraised *as of the value thereof existing at the date of the issuance of the certificate of purchase*, and gives the purchaser of the surface rights the right to purchase the reserved rights *at such appraised value* at any time within a year from the receipt by him of notice of the appraisal.

Section 4 provides that if the purchaser is dissatisfied with the appraisal, he may withdraw his application to purchase the reserved rights of the State. This section further provides that if the purchaser of the surface makes no application within one

year from receipt of notice of the appraisal to purchase the reserved rights, he shall be considered as having waived such preference right to purchase the reserved rights of the State.

Section 5 provides certain periods of limitations within which the State must bring any action to cancel any patent or certificate of purchase.

I beg to advise you that I am clearly of the opinion that this bill is unconstitutional for the following reasons:

Under the terms of the bill, the purchaser of surface rights offered and advertised for sale by your Board is given, without further consideration, a property right that was not offered for sale and which he never purchased, to-wit: an option to purchase the reserved mineral, coal and oil rights. This would be a clear case of the State giving away a property right, which I think it has no authority to do by any act of the General Assembly.

Not only is this option given to the surface purchaser without additional consideration, but it is an option to purchase the mineral, coal and oil rights, not for their present value but as of their value at the date of the issuance of the certificate of purchase of the surface rights. It may well be that the mineral, coal and oil rights in a given instance would be of much greater value now than they were at the time of the issuance of the certificate of purchase. For illustration, coal rights reserved to the State in lands lying beyond the Moffat Tunnel now being constructed are probably worth more now than they were before the tunnel was projected. Again, oil rights in the vicinity of Fort Collins are probably worth much more now than they were before the recent oil discoveries in that locality.

Section 10 of Article IX of the State Constitution provides that:

> "It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the State by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor."

Yet this bill would deprive your Board of its right to sell these reserved mineral, coal and oil rights to the highest bidder, but would require you to sell them without competitive bidding if the surface owner saw fit to exercise the option gratuitously awarded him by the bill.

The General Assembly has the right to provide reasonable regulations for the sale of State lands, but it would have no right to divest your Board of its power and duty under the Constitution to secure the maximum possible price for state lands. The duty that rests upon your Board to procure the maximum possible price for public lands applies to the mineral, coal, and oil de-

posits therein, as well as to the surface of the land. There can be no question upon this proposition.

In *In Re State Lands*, 18 Colo. 365, the Supreme Court said:

> "It is not to be inferred from this that all legislation upon the subject would be binding upon the State Board. Should the legislature, under the guise of regulations, attempt to take away all power of disposition of the state lands from the State Board, or should laws be enacted for the *manifest purpose of favoring other than the highest bidder, such acts would be manifestly in violation of the constitution, and void.*"

In view of the doctrine laid down in the above decision, I have not the slightest doubt that the Supreme Court would declare the present bill unconstitutional.

Section 5, as above stated, fixes certain limitations within which the State must bring any action to cancel a patent or certificate of purchase. It may be that this section would be upheld by the courts, but I venture the observation that it would be very poor policy to enact Section 5, even though the sections above discussed were eliminated from the bill. It might happen that a patent or certificate of purchase should be obtained from the State as the result of fraud, deceit, or conspiracy, and in that event the State should not be barred by any lapse of time from bringing an action to set aside the patent or certificate so obtained. At present there is no statute of limitations against actions by the State to cancel patents or certificates of purchase of public lands, and I think there should be none. In my opinion, the law should remain as it is on this matter.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

21. SCHOOLS

To Minnie Rimmer, March 6, 1925.

A school board may not use the Bond Fund of the district for the purpose of building a school house.

22. INSURANCE

To Jackson Cochrane, March 11, 1925.

A school board has no power, express or implied, to purchase or participate in the purchase of Group Insurance.

23. COUNTIES

To Roy Cox, March 11, 1925.

County and city warrants, drawn against a valid tax levy sufficient for their payment are securities within the meaning of H. B. 102, approved Feb. 25, 1925.

24. TAXATION

To H. W. Catlin, March 11, 1925.

Where several town lots and ranches are separately valued and assessed, although sold at tax sale under one certificate, the owner may redeem any one or more of such tracts without being compelled to redeem the whole.

25. COUNTY OFFICERS

Sheriff.

To John A. Carruthers, March 16, 1925.

A sheriff is not entitled to mileage or fees as such when transporting prisoners extradited from other states.

26. SCHOOLS

To Mrs. Etta Hall, March 18, 1925.

A teacher without a license is not entitled to compensation. The county treasurer is justified in refusing to honor a warrant issued to such teacher.

27. TEACHERS' PENSIONS

To G. W. Frasier, President Teacher's College, March 19, 1925.

In the absence of a statute making provision therefor, the Board of Trustees of the State Teachers College has no authority to appropriate money for paying premiums on pensions for teachers.

28. GOVERNOR

To Roy J. Weaver, March 19, 1925.

A nomination by the Governor to the office of Public Trustee may be recalled at any time before it is confirmed by the Senate.

29. GAME AND FISH

To F. E. Wheeler, March 21, 1925.

The fact that a man is the owner of land traversed by a fishing stream, or which is the habitation of game, does not give him the right to fish or hunt on said land without a license.

30. **SECURITIES ACT**

To L. A. Puffer and C. H. Rees, March 23, 1925.

The General Assembly could not, without amending the act, limit the amount that shall be paid out of these fees for *clerical assistance.*

31. **TEACHER'S CONTRACT**

To Pelton & Chutkow, March 26, 1925.

A teacher's contract with a school board which begins after the expiration of the term of office of one or more of the board members, is not invalid for that reason.

32. **TAXATION**

To C. E. Downtain, March 27, 1925.

When selling real estate for taxes County Treasurer is required to include taxes, interest and charges assessed against the owner thereof on personal property. Sec. 7402, C. L. 1921. A mortgagee may, before sale, pay the taxes on the real estate only, but after tax sale he can redeem only by paying entire amount bid at tax sale.

33. **SCHOOLS**

To John MacFadzean, April 2, 1925.

A new district may be formed from consolidated school district under the provisions of Sec. 8308, C. L. 1921.

34. **SCHOOLS**

To Geo. E. Vanderhoof, April 7, 1925.

All school children may be furnished transportation regardless of age.

The amount to be charged pupils for tuition in district other than that of residence is not covered by statute and should be agreed upon between the districts.

35. **GAME AND FISH**

To J. M. Scoville, April 7, 1925.

A land owner whose land is traversed by a stream in which trout are placed at the expense of the state has the right to exclude the public from fishing in such stream. Sec. 1457, C. L. 1921, and authorities.

36. ELECTIONS

To J. T. Palmer, April 10, 1925.

Incorporated Towns.

Where no election is held in an incorporated town at the time for holding such election, the officers last elected hold their offices until their successors are elected and qualified. Sec. 9061, C. L. 1921.

The Board of Trustees have the authority to fill by appointment a vacancy in the office of mayor. (Sec. 9063, C. L. 1921.)

Where for any reason municipal officers have not been elected at the regular time of election, a special election may be called by any three of the Board of Trustees last elected; but there is no requirement making the calling of such special election obligatory.

37. SCHOOLS

To Martha Thorne, April 11, 1925.

The addition of an auditorium and a gymnasium to a high school building, requires a vote of the high school district, under Sec. 8407, C. L. 1921.

38. COUNTY OFFICERS

To Tom G. Blevins, April 11, 1925.

Sheriff's Fees.

The sheriff in a fifth class county is entitled to a commission of one-half of one per cent, but not to exceed $25,00, on amount realized from the sale of real estate under foreclosure.

39. OFFICERS

To V. S. Fitzpatrick, April 14, 1925.

The fact that a member of the Board of Trustees of an incorporated town fails to attend board meetings does not create a vacancy in his office.

40. OFFICERS

To Dr. E. H. Taylor, April 16, 1925.

A county judge is not eligible to appointment as city attorney. (Sec. 402, C. L. 1921.)

41. COUNTY COMMISSIONERS

To Eugene Otis, April 16, 1925.

A member of the board of county commissioners should not be employed and paid by the county for labor on roads. (Sec. 7994, C. L. 1921.)

42. **SCHOOLS**

To T. E. Dunshee, April 16, 1925.

A high school district has no authority to employ a primary supervisor to supervise the various grade schools constituting the High School District.

43. **MOTOR VEHICLES**

To Hugh J. Harrison, April 16, 1925.

Exemption from Taxes.

An automobile is personal property and may be exempt from taxation if the personal property of the owner, including the automomile, does not exceed $200.00 in value. Sec. 7198, C. L. 1921.

44. **SCHOOLS**

To Oscar Porter, April 16, 1925.

A school district may not employ an unlicensed teacher. Payment of salary to such teacher by the school district may be enjoined by any taxpayer and the county treasurer may be enjoined from paying or registering warrant issued to such teacher.

45. **NORMAL SCHOOLS**

To H. V. Kepner, April 20, 1925.

Granting of Degrees.

Senate Bill 150, adopted by the 25th General Assembly does not authorize Normal Schools to grant liberal arts degrees.

46. **SCHOOLS**

To Leonard H. Harvey, April 27, 1925.

Legal Electors.

Before final proof the claimant of a homestead within the boundaries of a school district is a legal elector in said district even though absent from the homestead and from the district for thirty days or more prior to the date of the school election, when such absence is authorized by a leave of absence from the U. S. Land Office.

47. **SCHOOLS**

To Mrs. A. B. Baldon, May 1, 1925.

Payment of Warrants.

A county treasurer has no authority to pay or register a warrant of a second or third class school district unless the same is signed by the three directors.

If one director refuses to sign a legal warrant, he may be compelled by writ of mandamus to sign such warrant.

48. SCHOOLS

To S. J. Shadel, May 8, 1925.

A person elected as a member of a school board in a school district other than that in which he has his legal residence, is not qualified to hold the office.

49. PUBLIC TRUSTEE

To E. L. Weitzel, May 8, 1925.

The bond of a Public Trustee should be filed with the county clerk, and approved by the Board of county commissioners.

50. ESTATES

To Hon. James F. Sanford, May 9, 1925.

Oil Leases.

Secs. 5270 and 5296-5324, C. L. 1921, relating to lease and sale of real estate in estates, do not embrace oil leases.

Oil leases limited to 5 years, or to the time at which a ward obtains majority, would be valid.

51. TAXATION

To Clem W. Collins, May 12, 1925.

Personal property of Charitable, Religious and Educational institutions is subject to taxation.

52. HIGH SCHOOL DISTRICTS

To John I. Cochran, May 12, 1925.

The H. S. Committee in 4th and 5th class districts under authority of Sec. 8391, C. L. 1921, consists of the three members of the school district in the town or city in which the school building is located and one from each outlying district.

This committee may elect a president, treasurer and secretary and delegate to them the authority to sign warrants and perform the detail work of the committee.

53. CITIES AND TOWNS—TAXATION

To W. W. Platt, May 14, 1925.

The City Council of Alamosa has no power to impose a license tax upon an automobile bus line running between Alamosa and Salida. Such power is not conferred by either of Sections 8987 or 9046, C. L. 1921.

54. SCHOOLS

To J. A. Stiles, May 15, 1925.

An election called for the purpose of providing for the trans-

portation of pupils, under Sec. 8338, C. L. 1921, need not be a special election, but the subject may be included in the call for a general election.

The order for a tax levy made by the electors of a third class district at a special meeting called by the directors in accordance with Sec. 8380, C. L. 1921, is not a continuing levy, and must be ordered annually if required.

55. APPROPRIATIONS

Edward D. Foster, May 15, 1925.

The Item for "Statistical (gathering of statistics)" in general appropriation bill, may be used to pay clerk for compiling statistics.

56. HIGHWAYS

To J. A. Carruthers, May 19, 1925.

A board of county commissioners has the power to contribute toward the construction of a bridge on a state highway, to replace an old structure.

57. APPROPRIATIONS

To Charles Davis, Auditor, May 19, 1925.

It is doubtful whether Sec. 4264, C. L. 1921, creates a continuing appropriation for salary of Secretary of the Minimum Wage Commission.

And the same doubt exists as to whether Sec. 8271 creates a continuing appropriation for salary of the Assistant State Librarian.

See, however, Davis v. People ex rel. Lee, 78 Colo. 158; Davis v. People ex rel. Hyder, 78 Colo. 521.

58. APPROPRIATIONS

The Governor cannot, under Sec. 327, C. L. 1921, authorize expenditures for an educational institution where the revenues of the State have already been over-appropriated.

To Hon. Clarence J. Morley, Governor of Colorado, May 19, 1925.

Dear Governor:

I have just received a letter from Mr. H. V. Kepner, President of the Board of Trustees, in charge of the Adams State Normal School wherein it is stated that in anticipation of sufficient appropriations to conduct the school during the present biennial fiscal period, the Board some time ago issued announcements that a summer school would be conducted at the institution during the months of June, July and August of this year; that this announcement was given wide circulation and cannot now be recalled and that many students "will be coming to Ala-

mosa to attend this summer session." This letter further states that it was the intention to make this summer session as nearly self-supporting as possible but that the proposed session for this year would probably cost from four to six thousand dollars in excess of tuition fees received. Mr. Kepner further states that he writes this office at your request and that you wish to be advised how formal approval could be given by you for the incurring of the expenditures rendered necessary by this proposed summer session.

Section 327 C. L. 1921, forbids Boards of Control of state institutions from contracting any indebtedness in excess of the amount appropriated for the support of the institution in their charge. That section, however, provides "that in cases of emergencies the Governor may authorize the contraction of such indebtedness as in his judgment shall be absolutely necessary for the maintenance and support of the institution until such time as the General Assembly shall meet."

The above section would ordinarily, in my opinion, authorize you to declare an emergency in view of the above circumstances and to authorize the contraction of expenses in the amount said to be necessary for the purpose of conducting the proposed summer session, but the condition of the finances of the state during the present fiscal period raises another question which must be considered in connection with the above statute.

Section 16 of Article X of the State Constitution provides that no appropriation shall be made nor any expenditures authorized by the General Assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law and applicable for such appropriations or expenditures unless the General Assembly making such appropriations shall provide for levying a sufficient tax to pay such appropriation within such fiscal year. By Section 288 C. L. 1921, appropriations for educational institutions are placed in the third class.

While the appropriatins made by the last General Assembly have not yet been classified, my understanding is that it will develop that the first and second class appropriations will aggregate more than the entire estimated revenue for the present fiscal period. The result is, that probably nothing can be paid on account of appropriations for educational institutions where such appropriations are made out of the general revenues rather than out of specific mill levies.

Our Supreme Court has held that under Section 16 of Article X, appropriations made in excess of the revenues are absolutely void. See in re Appropriations 13 Colo. 316.

This office many years ago had under consideration the question whether the Governor could under said Section 327 declare an emergency and authorize the contraction of indebtedness by the state university where the General Assembly had already made appropriations of a higher class that fully exhausted the

revenues of the state for the then current period, and the conclusion of this office was that where the revenues of the state had already been exhausted by appropriations of the first and second classes the Governor had no power under said Section 327 to authorize expenditures for an educational institution.

We quote from the opinion of the Attorney General to Governor Thomas under date of July 5, 1899:

> "The Legislature being inhibited by the Constitution from making appropriations or authorizing expenditures in excess of the revenues, it follows as an elementary proposition that the legislature cannot, by statute, lawfully empower the Chief Executive to authorize expenditures in excess of the revenue."
> Report of Attorney General, 1899-1900, page 172.

I concur in the opinion above quoted which I find to be exhaustive and very well considered. I regret very much the dilemma that exists on account of the announcement of this summer school, but cannot do otherwise than to advise you as to the law as I believe it to be.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General,
By CHARLES ROACH,
Deputy.

59. APPROPRIATIONS

To M. C. Hinderlider, May 20, 1925.

Gauging Fund.

The Gauging Fund established by Sec. 1817, C. L. 1921, should not be used to pay general expenses of the office of the State Engineer until the primary purposes for which the fund was established have been satisfied.

60. APPROPRIATIONS

To S. R. Loeb, May 25, 1925.

There is no continuing appropriation for the salary of Pure Food and Drug Commissioner, and in view of the shortage of state revenues, the salary must cease for the present fiscal period.

The Auditing Board must determine whether appropriation for incidental and traveling expenses may be used for traveling and incidental expenses of the Pure Food Commissioner.

61. APPROPRIATIONS

To Governor Morley, May 25, 1925.

State Fair Commission.

The Governor has no power, under Sec. 327, C. L. 1921, to

authorize contraction of indebtedness for conduct of the State Fair, in view of the shortage of State revenues during the present fiscal period.

62. INSURANCE

To Jackson Cochrane, May 26, 1925.

Under H. B. 215, burial insurance may be taken out in the sum of not more than $900 upon the lives of children over 14½ years of age.

63. SALARIES

To Charles W. Davis, May 28, 1925.

When the Governor leaves the state and the Lieutenant Governor assumes the duties of the office of Governor, the Lieutenant Governor becomes entitled to the salary of Governor.

64. CIVIL SERVICE

To Civil Service Commissioners, May 29, 1925.

Secretary of Tax Commission.

If, for lack of funds, it is necessary to reduce the force in the office of the Tax Commission and if the secretary is competent to perform the duties of another position, wherein the work is similar and the incumbent was appointed later than the secretary, then the secretary would be entitled to be certified into such other position, if both cannot be retained.

65. CONSTABLES

To Charles O. Giffin, May 29, 1925.

A constable's jurisdiction is confined to the county of his residence, except where he has a criminal warrant which he may serve anywhere in the state. He may follow with a writ of attachment property removed into another county.

This jurisdiction is not extended by the prohibition law.

66. CIVIL SERVICE

To Civil Service Commission, May 29, 1925.

State Examiners.

If State Examiners whose salaries were vetoed are certified into other positions, they would, upon accepting such other positions, thereby abandon their positions as state examiners, which they could only regain by being transferred under Rule IX of the Rules of the Commission.

67. OFFICERS

Where a member of the State Land Board holds over, pending a contest over the title to the office, the State may safely pay him the salary of the office at least until the District Court has passed upon the question of title.

To Hon. Charles Davis, Auditor of State, May 29, 1925.

Dear Sir:

In your letter of the 26th inst. you state that after the final adjournment of the recent General Assembly, the Governor appointed John L. Lehman to the position of Engineer of the State Board of Land Commissioners to succeed Mr. Murphy and that on the 22nd ult. Mr. Lehman filed his bond and qualified for the position and thereafter demanded posession of the office and that Mr. Murphy refused to surrender possession, whereupon Mr. Lehman brought an action in quo warranto in the Denver District Court to determine his title to the office and such action is still pending and undetermined in said Court. You state further that Mr. Murphy has been paid his salary up to and until April 22, 1925. In view of the present litigation you ask whether vouchers for the remainder of the April salary and for the salary of this office for the present month which have been presented by Mr. Murphy should be honored by the issuing of warrants thereon.

I understand that Mr. Murphy was appointed Engineer of the Board pursuant to Section 9 of Article IX of the State Constitution for a term of six years commencing on the 2nd Tuesday of January, 1919. Mr. Murphy's term, therefore, expired by operation of law on the 2nd Tuesday of January, 1925.

The Constitution does not provide that members of the land board shall hold over until their respective successors are appointed and qualified, but Section 1 of Article XII of the Constitution provides that every person holding any civil office under the state shall, unless removed, according to law exercise the duties of such office until his successor is duly qualified. Since the office of Engineer of the Land Board is beyond question a civil office under this state, this general provision applies to such office and it follows that Mr. Murphy would have the right to exercise the duties of his office until his successor is duly qualified.

I am informed that Mr. Murphy has, at all times, remained and still remains in possession of the office and has performed and still performs the duties thereof. It appears that Mr. Murphy contends that the appointment of Mr. Lehman to succeed him was invalid and that, therefore, Mr. Lehman has not and could not duly qualify for the office. In view of these facts, it is my opinion that Mr. Murphy occupies the status of a *de facto* officer. As pointed out in the letter of this office to you under date of January 30, 1925,

The Courts of this state have repeatedly held that where the

state pays the salary of an office to the *de facto* incumbent thereof, the state is relieved from further liability on account of such salary even though it should afterwards develop that the *de facto* incumbent did not have the legal title to the office. See *Henderson v. Glynn,* 2 Colo. Appeals 302; *El Paso County v. Rohde,* 41 Colo. 258; *Thompson v. Denver,* 61 Colo. 470.

Our Courts have also held that a *de facto* officer may by suit require the payment of his salary even though he has no legal title to the office. *County Commissioners v. Wheeler,* 39 Colo. 207; *County Commissioners v. McLean,* 50 Colo. 602; *Haynes v. County Commissioners,* 66 Colo. 397.

In *Drach v. Leckenby,* 64 Colo. 546, the Court held that a *de facto* officer could not maintain a suit to recover his salary if the *de jure* officer had already established his title in a *quo warranto* suit.

In *Farr v. Neeley,* 66 Colo. 70, the Court held that where a *de facto* officer had collected the fees of the office, the *de jure* officer could maintain a suit against the *de facto* officer for the fees thus collected.

My conclusion, therefore, is that pending the decision of the District Court in the *quo warranto* suit above mentioned, it would be lawful and proper for you to continue to pay to Mr. Murphy the salary of the office in question. If the District Court should decide the controversy in favor of Mr. Lehman a different question will arise, and, in that event, this office will be ready to consider the matter further and advise you accordingly.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

68. CIVIL SERVICE

To Civil Service Commission, June 1, 1925.

Certification of Pay Rolls.

Neither the statutes nor the constitution require that the pay roll be signed by the head of the department, but it is necessary that the head of the department sign the salary vouchers in order to comply with the requirements of the appropriation out of which such salaries are paid.

The certification of pay rolls by the Civil Service Commission is to prevent the payment of salaries to persons whose positions are within the classified service, but who have not been appointed thereto in accordance with the requirements of the service.

69. AGRICULTURAL BOARD

It is doubtful whether the Governor may make recess appointment of members of the State Board of Agriculture in view of the fact that the outgoing members had the right to hold over under the constitution; but such recess appointees would be de facto officers and their acts would be valid.

To Dr. Charles A. Lory, President State Agricultural College, June 3, 1925.

Dear Dr. Lory:

In your letter of the 2nd inst. you state that doubt exists upon the question as to who are entitled to act as members of the State Board of Agriculture, in view of the facts hereinafter set forth. You also state that Governor Morley has requested you to ask my advice in the matter.

The facts as I understand them to be are as follows:

Upon the third Wednesday in January, 1925, the terms of office of the Honorable Alias E. Ammons and of Judge John C. Bell as members of the Board expired; that thereafter and while the Senate of the Twenty-fifth General Assembly was in session the Governor nominated Mr. Isaac Cassell of Montrose and Mr. John F. Mayes of Colorado Springs as members of the Board to succeed the members whose terms of office had theretofore expired as above stated; that the Senate failed or refused to consent to such appointments and adjourned sine die, April 16, 1925, without having confirmed either of them; that on April 17, 1925, after such adjournment of the Senate, the Governor by his executive order appointed or purported to appoint said Cassell and Mayes respectively as members of the Board for terms "expiring the third Wednesday in January, 1933."

I am also informed that Mr. Cassell has permanently removed from the State without having qualified for the office of member of the Board and without having offered to assume duty as such member. I am not advised as to whether or not Mr. Mayes intends to qualify and claim office under his appointment.

Mr. Ammons departed this life several days ago. The Governor's executive order does not designate which one of the new appointees shall succeed Mr. Ammons or which one thereof shall succeed Judge Bell. Under Section 3002, C. L. 1921, the members of the Board as originally constituted in 1877 are authorized to hold-over "until their successors are chosen," but there appears to be no statutory provision authorizing succeeding members of the Board to hold-over.

Section 3004, C. L. 1921, provides that "any vacancies in the Board caused by death, resignation or removal from the State may be filled by a majority of members," but this provision in my opinion does not apply to a case of vacancy arising by the expiration of the statutory term of office of a member.

Section 1 of Article 12 of the State Constitution provides that "every person holding any civil office under the State * * * shall

unless removed according to law exercise the duties of such office until his successor is duly qualified''; etc. I have no doubt that the members of this Board are civil officers under the State and that therefore this constitutional provision applies to them. Section 8 of the said Article 12 provides that ''every civil officer * * * shall before he enters upon the duties of his office take and subscribe an oath or affirmation to support the Constitution of the United States and the State of Colorado''; etc.

Assuming that these *ad interim* appointments were valid it would follow that unless the new appointees both accepted their purported appointments and qualified as required by the Constitution, Judge Bell would be authorized under the Constitution to continue to perform the duties of the office of member of the Board, and since, as I shall assume Mr. Cassell will not appear and claim office under his appointment, there will be at most but one claimant, that is, Mr. Mayes, and since the executive order does not designate whether Mr. Mayes shall succeed Mr. Ammons or Judge Bell, he could not in my opinion himself designate which one of the former incumbents he is to succeed. I therefore, suggest that if Judge Bell desires to continue to act as a member of your Board, then your Board may well continue to recognize him as such member under his Constitutional right to exercise the duties of the office until his successor is duly qualified.

Frankly, in view of the fact that the terms of office of Mr. Ammons and of Judge Bell as limited by law, expired while the Senate was in session and not during a recess thereof, and in view of the further fact that at the time of Governor Morley's executive order both Mr. Ammons and Judge Bell were living and were authorized by the Constitution to continue in the exercise of the duties of their respective offices, I entertain some doubt as to the right of the Governor to make these *ad interim* appointments.

Whether the Governor could now lawfully make an *ad interim* appointment to fill the actual vacancy occasioned by the death of Mr. Ammons it is not now necessary to consider, because in my opinion the executive order above mentioned had at least the effect of giving Mr. Mayes color of title to office as a member of the Board, and if he qualified and assumed to act as a member of the Board he would be at least a *de facto* officer and his acts as such would be valid. I therefore, suggest that if Mr. Mayes qualifies, and appears and claims title to the office under said executive order, he be admitted to the seat formerly occupied by Mr. Ammons and allowed to participate in the proceedings of the Board.

Since the death of Mr. Ammons occurred after his statutory term of office had expired, I am of the opinion as above indicated, that your Board would not have the right to appoint his successor under the power of appointment conferred upon the Board by the Statute above referred to. However, the Statutes (Section 3004, C. L. 1921) provide that ''a majority shall be a quorum for the transaction of business''; and if Mr. Mayes should fail to appear and claim the right to act as a member of your Board, I advise

that if a quorum be present, your Board proceed to organize and transact business in like manner as though a full Board were present.

Trusting that the above will be found sufficient for your guidance, I beg to remain

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

70. WORKMEN'S COMPENSATION

To Industrial Commission, June 5, 1925.

Contempt proceedings are not the proper method for enforcing awards of the Industrial Commission.

71. PLUMBING INSPECTOR

To Charles Davis, June 5, 1925.

Salary.

The salary of the Plumbing Inspector or any other appointed officer runs from the date of his qualification and assumption of the duties of the office.

72. INSURANCE COMMISSIONER

To Jackson Cochrane, June 5, 1925.

The permanent certification of the Commissioner of Insurance into the position, makes him in the generally accepted sense the head of the Insurance Department; but under Sec. 2473 C. L. 1921, it is necessary that the Governor approve all vouchers for salaries and expenses of the office.

73. SCHOOLS

To W. H. Albright, June 9, 1925.

Illegal votes cast at an election on the question of bonding the school district, should be thrown out, but do not invalidate the election. If such are counted and are sufficient to change the result of the election, there is ground for contest.

74. METAL MINING FUND

To M. B. Tomblin, June 11, 1925.

There is no legal authority for the transfer of funds from the Metal Mining Fund to the State School of Mines for the purpose of carrying on research and experimental work.

75. SCHOOLS

To John F. Murray, June 11, 1925.

A school board in a third class district, two members of which are retiring, has no authority to transact business for the district after the election of successors.

76. MOTOR VEHICLES

To R. L. Shaw, June 15, 1925.

Registration.

Under the new law, any motor vehicle owner who has owned the vehicle continuously for three years would be entitled to a certificate of registration without first receiving a certificate of title.

77. FEDERAL FARM BONDS

To W. D. MacGinnis, June 15, 1925.

Under S. B. 455, which does not go into effect until 90 days after April 16, 1925, it is within the discretion of the State Treasurer to accept Government Bonds and Federal Farm Loan Bonds as security for public deposits, although he is not compelled to do so, in view of his absolute liability under the Constitution for the keeping of State funds.

78. BOUNDARY LINES

To M. C. Hinderlider, June 18, 1925.

It is the duty of the State Engineer to make survey of disputed boundary lines between counties when called upon to do so by the commissioners of one or more of the counties interested, as provided by Sec. 8646, C. L. 1921. The expense of such survey shall be borne equally by the counties interested.

79. CIVIL SERVICE

To State Civil Service Commission, June 25, 1925.

The Governor has the right to appoint unpaid prohibition agents without the approval of the State Civil Service Commission.

80. NATIONAL GUARD

The Governor has no power to appoint officers in the Colorado National Guard that are not provided for by State statutes, or by National Guard regulations, or War Department orders.

To Hon. Charles Davis, Auditor of State, June 24, 1925.

Dear Sir:

In your letter of the 18th inst. you state that you have "received a voucher, in regular form from the military department for the pay of Colonel John G. Locke, M. C. for $1,599.98 to and

including June 13, 1925." You further state that "The claim is made that Colonel Locke was committed to the custody of the United States Marshal by the United States District Judge of the Colorado District prior to June 13th, and therefore could not have performed the duties of his office, hence was not entitled to pay for the term of such confinement." And you ask my opinion as to whether you would be "justified in issuing a warrant covering the time in question." On the 19th inst. you supplemented your written inquiry by a verbal request that this office examine into the question of the validity of the appointment of Colonel Locke to the office referred to, and to advise you accordingly.

The Federal Constitution provides that "The congress shall have power * * * To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress". (Sec. VIII).

Our state constitution provides that:

> "The Governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States." (Art. IV, Sec. 5).
>
> "The organization, equipment and discipline of the militia shall conform as nearly as practicable to the regulations for the government of the armies of the United States". (Art. XVII, Sec. 2).
>
> "The Governor shall appoint all general field and staff officers and commission them". (Art. XVII, Sec. 3).

The National Guard Act of 1921 (Ch. 183, S. L. 1921) repealed the then existing statutes upon the subject, and now constitutes the military code of the State.

Sec. 1 of that Act provides that "The Governor shall be commander-in-chief of the organized militia except when called into the service of the United States", etc.

Sec. 2 provides that:

> "The Adjutant General and all general, field and staff officers shall be appointed by the Governor. The Adjutant General and all officers shall be appointed as provided for in National Guard Regulations."

Sec. 4 reads as follows:

> "The organized militia shall be designated the 'Colorado National Guard.' The Colorado National Guard shall consist of the Staff of the Commander-in-Chief, and such departments and staff corps and organizations as shall be prescribed by the War Department for the National Guard. It shall be the duty of the Governor, by and with the advice of the Military Board

to make and publish such orders as may be necessary to conform said National Guard of Colorado in organization, armament and discipline to that prescribed for the Regular Army of the United States, subject to such general exceptions as may be authorized by the laws of the United States, and for this purpose the Governor may increase or decrease the number of officers and non-commissioned officers of any grade to the extent made necessary by changes authorized by War Department Orders or National Guard Regulations."

Sec. 7 provides that:

"All officers shall be appointed and commissioned by the Governor in their respective commands upon the recommendation of the commanding officer thereof, provided that all officers will be appointed and commissioned as provided for by War Department Orders or National Guard Regulations."

Sec. 8 provides that:

"When a vacancy exists among the commissioned officers of any organization of the National Guard of Colorado, the vacancy shall be filled as provided by Section 7".

Sections 56 and 57, respectively, read as follows:

"Section 56. In case of conflict between any of the provisions of this Act and Army Regulations, War Department Orders or National Guard Regulations, now in force or hereafter promulgated by the War Department, such War Department Regulations and Orders or National Guard Regulations shall be paramount and the conflicting provisions hereof be of no force or effect."

"Section 57. On all military procedure and subjects arising in this State and not specifically covered by the provisions of this Act, the Laws, Regulations and Orders of the War Department, shall be considered to cover such procedure and subjects."

Section 62 reads as follows:

"Section 62. Whenever in this Act reference is made to War Department Orders, Army Regulations, and customs of the service, they shall be deemed to be War Department Orders, Army Regulations and customs of the service as are issued and pertain to the United States Government or its branches for the guidance and discipline of the United States Army; and when reference is made to National Guard Regulations, it shall be deemed to be such National Guard Regulations as may be issued by the War Department of the United States for the regulation of the National Guard."

Bearing in mind the fact that our statute requires that the "National Guard shall consist of the staff of the Commander-in-Chief, and such departments and staff corps and organizations as shall be prescribed by the War Department for the National Guard, I now direct attention to paragraph 141 of the National Guard Regulations issued by the Secretary of War under date of February 23, 1922. That paragraph reads as follows:

> "Under the provisions of the act of Congress approved May 12, 1917, the Secretary of War authorizes the numbers of officers and enlisted men of the staff corps and departments, National Guard, set forth in the tables in paragraph 152. These officers and enlisted men are in addition to officers and enlisted men of staff corps and departments who are authorized for tactical units (regiments, brigades, divisions, etc.) in accordance with Tables of Organization. The several States are authorized to maintain the officers and enlisted men listed in the tables in paragraph 152 for purposes of administration, sanitation, supply and transportation, their functions to correspond to those of like staff corps and departments in the Regular Army."

The Executive Order appointing or purporting to appoint Colonel Locke was entered January 20, 1925, and reads as follows:

> "Executive Order.
>
> Ordered:
>
> That Dr. John Galen Locke be and he hereby is appointed colonel, Medical Corps, Colorado National Guard. This officer is assigned to the governor's staff as aid-de-camp, recruiting and publicity officer for the Colorado National Guard. Federal recognition will not be requested for this officer at the present time in his present grade, the appointment being made for the convenience of the state only.
>
> Given under my hand and the executive seal of the State of Colorado this twentieth day of January, A. D. 1925.
>
> CLARENCE J. MORLEY,
> Governor."

Noting the fact that the Executive Order purports to appoint Dr. Locke to the office of "colonel medical corps", the query at once arises as to whether there exists any such office in the Colorado National Guard; for if no such office exists there could, of course, be no valid appointment. Recurring again to the fact that, under our statute, "all officers shall be appointed as provided for in National Guard Regulations", and that the Guard shall "consist of the staff of the Commander-in-Chief, and such

staff corps and organizations as shall be prescribed by the War Department for the National Guard", resort must now be had to the "tables in paragraph 152" referred to in said paragraph 141 of the National Guard Regulations. It appears from that table that where the strength of the National Guard is from 1,000 to 2,000 men, as in the case of Colorado, the "Medical Department" must consist of "1 captain, 1 sergeant, 1 corporal, 1 private, first class, 1 private". That is to say, the highest officer that exists in the Medical Department of the Colorado National Guard is that of captain. According to the published table, there can be a colonel in the Medical Department, only in those cases where the state National Guard has a strength of from 12,000 to 18,000 men.

The State Constitution, as already quoted, provides that the Governor "shall *appoint* all general field and staff officers and commission them". But this, in my opinion, does not authorize the Governor to appoint officers who are not authorized either by the state statute or the National Guard Regulations or Orders of the War Department.

It remains to be considered whether the fact that this executive order not only purports to appoint Dr. Locke "Colonel, Medical Corps", but assigns him "to the Governor's staff as aid-de-camp, recruiting and publicity officer" affects the situation. In other words, could this executive order be upheld as being in reality an appointment of Dr. Locke as a colonel, or aid-de-camp, or recruiting and publicity officer upon the staff of the Governor as commander-in-chief, despite the fact that it also purports to appoint him to an office that does not exist, as already shown?

It will again be noted that Sec. 4 of the act of 1921 provides that the Guard "shall consist of the staff of the commander-in-chief, and such departments and staff corps and organizations as shall be prescribed," etc. And this raises the question as to what officers the staff of the commander-in-chief may consist of.

The National Guard Act of 1897 expressly provided that the staff of the commander-in-chief should consist of certain designated officers of the National Guard, including two aides-de-camp with the rank of colonel. See S. L. 1897, Ch. 63,, Art. III, Secs. 1 and 2.

These sections were amended in some particulars by Secs. 1 and 2 of Ch. 185, S. L. 1909.

And Ch. 122, S. L. 1915, expressly repealed both the original and the amendatory sections, and Sec. 4 of this act of 1915, expressly abolishes the office of aid-de-camp. This act of 1915 contains no provision respecting the staff of the commander-in-chief. It does not even provide that the commander-in-chief shall have a staff. While the act of 1921, as already observed, mentions the staff of the commander-in-chief, it utterly fails to designate who shall or may constitute the personnel of that staff. Nor does it authorize the Governor to appoint officers in

addition to those authorized by National Guard Regulations and assign them to his staff.

Sec. 23 of the Act of 1921, provides that the State Military Board "shall prescribe such regulations not inconsistent with law as will increase the discipline and efficiency of the National Guard". Under date of August 23, 1921, the Military Board promulgated a code of regulations. That code provides that:

> "The staff of the commander-in-chief shall be as prescribed by War Department Orders and National Guard Regulations."

It may well be doubted whether the delegated power of the Military Board to make "regulations" is broad enough to authorize it to designate who shall constitute the staff of the commander-in-chief. Be that as it may, I find no National Guard Regulation or War Department Order that purports to prescribe the personnel of the staff of the commander-in-chief of the National Guard of a state. Paragraph 150 of the National Guard Regulations recites that "Officers on the staff of the governor not detailed from National Guard organizations of the line or of the staff corps and departments are not a part of the National Guard under existing laws." This, of course, recognizes the right of the Governor, as commander-in-chief, to have a staff but it falls far shart of prescribing the personnel of any such staff; and, as already observed, the state law utterly fails to designate the Governor's staff, but does provide that "all officers shall be appointed as provided for in National Guard Regulations." (Sec. 2.)

Paragraph 318 National Guard Regulations provides that "An officer for each regiment and for each battalion and company stationed separately shall be detailed by the commanding officer thereof to recruit for the organization". Our state statute contains no authority for the appointment of a recruiting and publicity officer apart from the regular personnel of officers as prescribed by National Guard Regulations. It may be that the commander-in-chief would be well within his authority in assigning an officer who is provided for in the regulations to active duty as a recruiting and publicity officer, but that question is not now involved and need not be determined.

In view of the facts, (1) That the office of "Colonel, Medical Corps" does not and cannot exist in our National Guard, (2) that the office of aid-de-camp was expressly abolished by the act of 1915 and was not reestablished by the act of 1921, (3) that our statute contains no provision for a recruiting and publicity officer apart from the regular organization as prescribed by the National Guard Regulations, I can reach no other conclusion than that the appointment of Dr. Locke as set forth in the executive order of January 20, 1925, is not valid or effective; nor is the situation changed in any material respect by the amendatory order of June 17, 1925.

I am aware of the fact that courts have frequently held that salary may lawfully be paid to a *de facto* officer though he is not the *de jure* incumbent. But it has also been universally held that there can be no *de facto* officer unless there is a *de jure* officer. In other words, the office itself must have a lawful existence before any one can acquire the status and rights of a *de facto* incumbent. And in this case it has developed that there was no *de jure* office; therefore the purported incumbent could not, in my opinion, lawfully be paid any salary as a *de facto* incumbent.

This office has on recent occasions, as you will recall, advised you as a responsible, bonded accounting officer not to issue salary warrants where the right thereto was in grave doubt, but to relegate the matter to the courts for determination. In justice to you and to the State Treasurer, as well as to the public, I must adopt the same course in this instance and advise you fully as to my views and conclusions. I think you should decline to issue a warrant upon this voucher until the matter shall have been determined by the courts.

Yours respectfully,

WILLIAM L. BOATRIGHT,

Attorney General.
By CHARLES ROACH,
Deputy.

81. CIVIL SERVICE

To Charles Davis, July 15, 1926.

An agent appointed by the Governor to investigate highway projects cannot be paid out of the appropriation for incidental and contingent expenses of the Executive Department, unless the appointment is made pursuant to Civil Service regulations.

82. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, July 31, 1925.

While there is no Colorado statute authorizing the insuring of the value of lands against depreciation, a foreign insurance company doing such business may be admitted into this State on the grounds of comity.

83. CIVIL SERVICE COMMISSION

The Civil Service Commission has no power to delegate to its secretary the entire conduct of competitive tests.

To Mrs. Elizabeth Quereau, Member State Civil Service Commission, August 5, 1925.

Dear Mrs. Quereau:

In your letter of the 5th inst., you ask the opinion of this office upon the following state of facts as set forth in your letter, viz.:

"On April 18, 1922, the Civil Service Commission—then composed of Mrs. Kirkland, Mr. Roberts and Mr. Trounstine—agreed to delegate the examining power to the secretary of the commission and vest the entire power with her, the commissioners themselves not seeing the questions until after said questions had been given to the applicants. It seems that continuously from the above date the commission has carried on with the above policy."

You state further that when you were appointed to office, it was your understanding that you would have "something to do with making the policy and general trend of examining questions" and that you had offered to assist the commission along this line but were not permitted to do so. You also state that you are now asked by the commission to help in the marking, grading and endorsement of some recent examination papers and ask our opinion as to whether it would be legal and proper for you to aid in this work in view of the facts above related.

It will, of course, be understood that this office has no part in the internal administration of the affairs of any department of the State, and would not interfere in such a matter, and this letter must be considered as dealing with a purely legal question raised by your inquiry, since this office feels that you, or any other member of your commission, are entitled to the opinion of this office on legal questions affecting your powers and duties. The main question raised by your letter is whether it is lawful for the commission to delegate to its secretary the entire conduct of examinations, and to exclude an individual member of the commission from participating therein in the matter of reviewing the questions proposed to be asked of those taking civil service examinations.

The Civil Service Act of 1907 established a purely statutory system of "Civil Service". Section 3 of that act authorized the commission thereby established to appoint a secretary "who shall also be chief examiner, and who shall superintend under their direction any examination under this act". (Section 3, Chapter 117, S. L. 1907.)

Said Section 3 was amended by the initiated act of 1912; and as so amended the section provided that "the employes of the commission shall be a secretary and chief examiner and such examiners, stenographers and other assistants as the commission may deem necessary". (S. L. 1913, page 682.)

The Civil Service Act of 1915 repealed the Act of 1907 and the initiated Act of 1912. Section 4 of the Act of 1915 provided that the commission should appoint a secretary and that "the secretary shall be chief examiner". (S. L. 1915, page 144.)

It thus appears that under all former civil service statutes, the secretary of the commission was expressly declared to be chief examiner, and, of course, under these statutes the duty

of conducting examinations could and indeed must be delegated to the secretary of the commission.

Section 13 of Article XII of the State Constitution, which section was adopted in 1918 superseded the civil service statute of 1915. That amendment created the present commission and prescribed its powers and duties. The amendment expressly declares that "the conduct of all competitive tests * * * the determination of standards of efficient service and the determination of the grades of all positions in the classified service shall be vested in the commission". The amendment does not create or mention the office of secretary or chief examiner. Section 1 of the Act of 1919 adopted for the purpose of carrying out the constitutional amendment, provides that the commission "is hereby authorized to appoint a secretary", etc., but neither the statute nor the constitutional amendment prescribes the powers or duties of the secretary.

Paragraphs 7 and 9 of Rule IV of the rules of your commission as approved September 9, 1919, provide as follows:

> "(7) The subjects of examinations and the weight to be attached to each subject in marking shall be determined by the chief examiner, subject to the direction and approval of the commission."
>
> "(9) In preparing the questions to be used in an examination the chief examiner may consult with the head of the department or with experts, in regard to the duties of the position to be filled. But the questions actually to be used shall be kept absolutely secret in advance of the examination."

These rules were perhaps well adapted to carry out the statutory system of civil service as established by the acts above mentioned, and my understanding is that these rules were adopted while the above statutes of 1907, 1912, or 1915 were in force, and were continued as the rules of the present constitutional civil service commission. In other words, when in September, 1919, your commission adopted a set of rules, it incorporated in them many of the rules of the former statutory Civil Service Commissions including the two paragraphs above quoted.

The conduct of competitive tests is one of the principal functions expressly vested in the commission by the constitutional amendment and neither the amendment itself nor the statute adopted to carry it out authorizes the commission to delegate that function to any other person.

As a legal proposition I am compelled to say that, in my opinion, it was a mistake for the commission to vest the entire conduct of competitive tests in the secretary, to the exclusion of its own right, or that of any member, to participate therein in the respect mentioned in your letter. I think that, under the Constitution, it is the function of the commission to, at least, supervise and retain control over the conduct of competitive tests;

and it follows, of course, that any member of the commission would be entitled to participate in the work of conducting these tests, and this would include inspection of the questions to be asked persons taking such tests. The right of the commission, through its secretary or otherwise, to secure expert aid in preparing lists of questions is undoubted; but the ultimate power and responsibility in reference thereto is vested by the Constitution in the commission.

It is unnecessary to say that these statements are made without the slightest disparagement of the ability and integrity of the secretary of the commission, and without the slightest reflection upon the integrity or motives of the commissioners who adopted the Rules of 1919 or the resolution of April 18, 1922, or the present commissioners.

I think the commission was very naturally led into error in carrying out the constitutional amendment by following too closely the statutory systems above mentioned and the rules adopted to carry them out.

Your next question is whether or not it would be legal and proper for you to assist in grading the papers now before the commission in view of the fact that you took no part in preparing the examinations from which those papers resulted. Upon this point I do not hesitate to say that, in my opinion, it would be perfectly proper for you to participate in this work if you see fit so to do.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

For authorities upon the proposition that the conduct of competitive tests is a discretionary power that cannot be delegated in the absence of constitutional authority, so to delegate such power see:

McCullough v. Scott, 109 S. E. 789. 23 Am. & Eng. Enc. Law, 365 (2nd Ed.) 29 Cyc. 1433.
Throop on Public Officers, Sec. 573.
State v. Poplarville S. Co. 81 So. 124.

84. STATE BOARD OF LAND COMMISSIONERS

To State Land Board, August 11, 1925.

The Federal Tax Act requiring stamps to be affixed to conveyances of land does not apply to patents issued by the State.

85. CORPORATIONS

To Hiram E. Hilts, August 19, 1925.

License Tax.

Where all the stock in a private corporation is owned by a municipality, such corporation need not pay the corporation license tax provided for by Sec. 7270, C. L. 1921.

86. INSURANCE

To Jackson Cochrane, August 25, 1925.

Sec. 2500, C. L. 1921, prohibiting insurance companies from doing business of more than one general class, does not apply to foreign admitted companies.

87. INSURANCE

To Jackson Cochrane, August 25, 1925.

Contracts of insurance upon the lives of children for amounts in excess of the statutory limitations are void.

88. IRRIGATION DISTRICTS

To George M. Corlett, Sept. 1, 1925.

Lands acquired by an irrigation district, under Sec. 1999, C. L. 1921, are subject to general taxation after tax deed has been issued to the district.

89. SCHOOL BUSSES

To James H. Wilson, Sept. 4, 1925.

Chauffeurs' license not required of boys driving school busses, if such boys are not chauffeurs under Sec. 10, Ch. 149, S. L. 1923.

90. MOTOR VEHICLES

To Carmel Salazar, Sept. 10, 1925.

License Fees.

Automobile license fees collected by the county clerk may not be applied to the payment of salary, but must be accounted for as provided in Sec. 1357, C. L. 1921.

91. STATE LANDS

To State Board Land Commissioners, Sept. 18, 1925.

By virtue of Sec. 1178, C. L. 1921, the equitable interest of a purchaser of State lands is subject to taxation and such interest may be sold at tax sale.

Said Sec. 1178 does not violate the provisions of Art. X, Sec. 4, of the State Constitution.

92. **SCHOOLS**

To Mrs. Rose Bishop, Sept. 29, 1925.

Absence of a member of the school board from the district for 30 days or more, without leave, does not automatically create a vacancy.

Such absence may be held to work a vacancy in said office when so declared by the vote of three-fourths of the remaining members of the board.

93. **SCHOOLS**

To B. S. Reynolds, Sept. 30, 1926.

An honorary or eminent service certificate qualifies the holder to teach in all public schools.

94. **INSURANCE**

To Jackson Cochrane, Commissioner of Insurance, Oct. 1, 1925.

Because of the conflict between Sections 2583 and 2528 C. L. 1921, the safer practice is to forbid fire insurance companies to give rebates to educational institutions.

95. **FEES, REFUND OF**

To L. T. Morgan, Nov. 6, 1925.

The docket fee paid by defendants under requirements of Sec. 6194, C. L. 1921, should be refunded where defendant is acquitted.

96. **SCHOOLS**

To F. W. Grove, Oct. 3, 1925.

School districts have no authority to transport pupils to parochial or private schools.

Under Sec. 8338, C. L. 1921, the minimum distance necessitating transportation is in the discretion of the school board.

97. **INSURANCE**

To Jackson Cochrane, Commissioner of Insurance, Oct. 9, 1925.

The "employer" mentioned in the law providing for group insurance, Chap. 135, S. L. 1919, can be created for compliance with the act if the group to be insured is otherwise in harmony with all requirements.

98. **SCHOOLS**

To J. W. Goldsmith, Oct. 15, 1925.

The money in a building fund derived through taxation or by the sale of bonds must be kept intact and used for the purpose intended. It may not be transferred to another fund and used for the payment of warrants issued for other purposes.

99. SCHOOLS

To George D. Miller, Oct. 16, 1925.

A pupil may attend school in a district other than that of his residence, the board of such other district consenting, but the parent would be liable for such tuition as the district demanded, unless such attendance were arranged in accordance with the provisions of Sec. 8333, C. L. 1921.

100. PRINTING

To State Board of Stock Inspection Commissioners, Oct. 15, 1925.

The statutory provisions requiring printing for all state departments to be done under the supervision of the Commissioner of Public Printing applies to the State Board of Stock Inspection Commissioners.

101. TAXATION

To Joseph E. McElvain, Oct. 19, 1925.

The property of hotel or transportation companies in national parks is not exempt from taxation.

102. RAILROADS

To S. M. Konkel, Oct. 21, 1925.

A railroad company may exchange mileage books for advertising, such mileage being furnished at the same price charged the general public, without violating the anti-pass law.

103. TAXATION

To I. E. Stutsman, Oct. 26, 1925.

The matter of excusing pupils during school hours for the purpose of receiving religious instruction rests in the discretion of the Board of Education.

104. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, Nov. 2, 1925.

Securities of an insurance company on deposit with the Commissioner of Insurance cannot be withdrawn unless other securities of equal value are substituted.

105. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, Nov. 2, 1926.

Appraisement of the assets of a domestic insurance company outside of the state can only be had after the Governor has consented to the examination. The cost of such appraisement must be borne by the insurance company.

106. **INSURANCE**

To Jackson Cochrane, Commissioner of Insurance, Nov. 2, 1925.

Section 2517, C. L. 1921, should be interpreted to mean that the age of an insured cannot be reduced more than one year by the dating back of the policy.

107. **CIVIL SERVICE**

To State Civil Service Commission, Nov. 3, 1925.

Employes, except officers and teachers, of the State University and of the Teaching and Psychopathic Hospitals, connected therewith, are within the Classified Civil Service.

108. **PHARMACY**

To Chas. J. Clayton, Nov. 5, 1925.

Under the provisions of Sec. 4593, C. L. 1921, a merchant in a town of less than 500 population where there is no licensed pharmacy, may sell such medicines, compounds or chemicals as are required by the general public.

109. **COUNTY COURT**

To L. T. Morgan, Oct. 5, 1925.

A probationary discharge of a lunatic by the superintendent of the Colorado State Hospital does not divest the county court of its jurisdiction over the lunatic or his estate, such jurisdiction continuing until the lunatic is discharged by the court.

110. **TAXATION**

To G. E. Hendricks, Nov. 7, 1925.

The tax levy for school purposes may cover, in addition to the amount certified, an additional amount sufficient to meet legal fee of county treasurer of 3% for collecting the taxes.

111. **INSURANCE**

To Jackson Cochrane, Commissioner of Insurance, Nov. 10, 1926.

The Commissioner of Insurance should not accept a personal bond unless he is satisfied that the parties signing the bond are financially able to pay the amount of the bond in the event that the conditions are not complied with.

112. **COUNTY OFFICERS**

To J. Arthur Phelps, Nov. 15, 1925.

A sheriff, jailor, constable or other law officer who wilfully refuses to receive prisoners charged with a criminal offense, is

subject to a fine and imprisonment, but the charge must be properly made by formal complaint before a magistrate, under Sec. 6808, C. L. 1921.

113. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, Nov. 21, 1925.

The Commissioner of Insurance has no discretion in granting or refusing a license to a company which is legally organized and has complied with all the conditions imposed by the Mutual Insurance Act.

114. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, Nov. 21, 1925.

Under H. B. No. 215, General Assembly 1925, life insurance should not be written to cover cases where the actual age of the insured is less than fifteen years.

115. INSURANCE

To Jackson Cochrane, Nov. 23, 1925.

Insurance policies written on the lives of children in violation of Sec. 2512, C. L. 1921, and Chap. 115, S. L. 1925, are void and companies writing such insurance are liable to have their authority to do business in this State revoked.

116. VOCATIONAL REHABILITATION

To Industrial Commission, Nov. 27, 1925.

Vocational rehabilitation is intended under the Federal statutes to be carried on by state boards of vocational education acting in co-operation with the Federal Board for Vocational Education.

117. ALIENS

To R. G. Parvin, Nov. 27, 1925.

Sections 6880-6888, C. L. 1921, regulating the possession of firearms by aliens are constitutional.

118. AGRICULTURAL COLLEGE

To President Charles Lory, Nov. 27, 1925.

Appropriations of the first and second classes must be taken care of before third class appropriations are provided for.

119. TEACHERS' COLLEGE

To G. W. Frasier, Nov. 28, 1925.

Sec. 164, S. L. 1925, provides for the purchase and improvement of additional land, etc., and appropriates $15,000 therefor. Land could not be acquired by condemnation proceedings under this statute.

120. **INSURANCE**

To Jackson Cochrane, Commissioner of Insurance, Dec. 2, 1925.

Sec. 5, Chap. 117, S. L. 1925, does not apply to companies having an authorized minimum capital of less than $100,000.

121. **CHILD LABOR LAW**

To. M. H. Alexander, Labor Commissioner, Dec. 14, 1925.

The State Home for Dependent and Neglected Children should comply with the child labor law.

122. **COUNTY COURT**

To Clarence M. Smith, County Judge, Dec. 14, 1925.

Section 5364, C. L. 1921, requires payment of the hospital bill of a mental incompetent before the closing of his estate, if solvent, but it should not be construed as meaning that such payment should be deferred until the death of the patient.

123. **OFFICERS**

To J. Alfred Ritter, Dec. 15, 1925.

The Governor has no power, after the adjournment of the senate to appoint members of the Board of Trustees of the Colorado School for the Deaf and Blind when the vacancies did not occur during the recess of the senate.

124. **PROHIBITION**

To Clarence J. Morley, Dec. 23, 1925.

The Governor probably has the right to abolish the paid law-enforcement force and retain a voluntary force of agents. See Lee v. Morley, 79 Colo. 481.

125. **IRRIGATION DISTRICTS**

To M. C. Hinderlider, Dec. 29, 1925.

Only entrymen who have actually lived on their land and paid taxes for the required time are entitled to vote at irrigation district elections.

126. **REVENUES**

To Charles Davis, Dec. 29, 1925.

Institutions supported by continuing mill levies are supposed to keep within those levies for each year.

127. **COLORADO AGRICULTURAL COLLEGE**

To Dr. Chas. A. Lory, Dec. 30, 1925.

The Colorado Agricultural College is not liable for injuries sustained by a student at a "Y. M. C. A. Mixer".

128. BOARD OF HEALTH

To Dr. S. R. McKelvey, Dec. 31, 1925.

Appointment of Members of Board.

Under Sec. 870, C. L. 1921, members of the State Board of Health are appointed by the Governor with the approval of the senate.

Recess appointments by the Governor are invalid, under ruling in Murphy ex rel v. Lehman, rendered by Supreme Court on Nov. 9, 1925.

Where two appointments are to be made and one is made regularly, but without designating which outgoing member the appointee is to succeed, the only solution is to hold that both old members remain on the Board.

129. COUNTIES

To F. D. Guinn, County Judge, Jan. 6, 1926.

A county judge has no power to compel the payment of Mothers' Compensation out of the County Poor Fund.

130. COUNTY OFFICERS

To Mr. George D. Criley, County Commissioner, Jan. 7, 1926.

The salaries of deputies in the offices of the county clerk and county treasurer may legally be paid out of the general fund of the county.

131. HIGHWAY DEPARTMENT

The Governor does not have the power to abolish positions in the State Highway Department.

The Governor has power to provide in the annual budget how the contingent fund provided for in the budget shall be used.

To Major L. D. Blauvelt, State Highway Engineer, Jan. 11, 1926.

Dear Sir:

With your letter to me under date of the 4th inst. you transmit a copy of the Annual Budget for the year 1926 of the State Highway Department as finally approved by the Governor, and you ask my opinion upon certain specific questions you submit with reference to said budget as so approved.

Section 14 of the present Highway Law (Ch. 136, S. L. 1921) provides that the State Highway Engineer shall be the chief executive officer of the State Highway Department, and Section 16 provides that the Attorney General shall be, ex-officio, attorney and legal adviser for the State Highway Department and shall give it such legal counsel, advice and service as it may from time to time require. In view of these provisions I feel that it is my duty to consider and answer the questions you submit, and they will therefore be taken up and answered in the order submitted.

It appears that, before approving the budget, the Governor added thereto, among other provisions, the following: "The State Maintenance Department as such is hereby abolished and the duties thereof transferred to the Engineering Department".

Your first question is: "What effect, if any, has the Governor's statement that 'the State Maintenance Department as such is hereby abolished and the duties thereof transferred to the Engineering Department.' "

This question requires us to consider what powers are by the highway law vested in the Governor with reference to the personnel of the department and the duties of the various employes thereof. Section 7 of the act provides that:

> "There is hereby created a State Highway Department, which shall consist of the Governor, State Highway Engineer, Highway Advisory Board of seven members, and such assistants, clerks and other employes, as may be employed to carry out this act."

The specific provisions with reference to the formation of the annual budget are found in Sections 12 and 29 of the act. These provisions seem to be somewhat conflicting as to the procedure to be followed in formulating the annual budget, but it will be noted that Section 29 provides that "The budget shall be so prepared that it may be readily understood *how much* it is proposed to expend for administrative purposes", etc. Section 12 requires the Highway Engineer to furnish the Highway Advisory Board not later than December 1 of each year a full and complete budget *for all expenditures* for the department for the ensuing year; and the Advisory Board is required to meet and review such budget and make its recommendations with reference thereto as it may deem advisable and submit the same to the Governor not later than December 15, "and the Governor *shall make up the final budget therefrom*". By Section 29 it appears to have been intended that the budget should, in the first instance, be prepared by the Highway Advisory Board, rather than by the State Highway Engineer, as required by Section 12; for Section 29 provides that "It shall be the duty of the State Treasurer and the Highway Engineer to give, on request, such information as the Highway Advisory Board may need *for the preparation of the budget*. The same section requires the Advisory Board, in preparing the budget, to give full consideration to the recommendations of the chairmen of the boards of county commissioners of all the counties in the State. The section concludes—"The budget *in its final form so prepared*, shall be issued in printed form and sent free of charge to any citizen of the State who may apply for the same". This later section makes no mention of approval of the budget by the Governor, but distinctly vests in the Advisory Board the power to make up the budget *in its final form*, after having called upon the State Treasurer and the Highway Engineer for infor-

mation, and after having considered the recommendations of the various chairmen of county boards. It is a rule of statutory construction that, where provisions in the same act are conflicting, the later provision controls, but there is an equally well established rule frequently applied by our Supreme Court, that full force and effect will wherever possible be accorded to every part of a statute, and that no single provision will be held to be nullified by another if the two can possibly stand together. Applying that rule, we hold, as a preliminary matter, that under Section 12 the Governor has the power to *"make up the final budget therefrom"*, regardless of the provisions in Section 29 above pointed out, and such, I understand, has been the construction that has always been placed upon this act by all concerned in its administration. The real question is within what limits, if any, must the Governor act in making up the budget from the data submitted to him as the statute requires. Does this power "to make up the final budget therefrom" authorize the Governor to control the number or duties of the employes of the department, and, if so, to what extent.

The power given the Governor "to make up the final budget therefrom" is a broad and comprehensive power vested in him by general language. There are other and more specific provisions of the act that must be considered, for the rule is that—"Where there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of the general provision, then the particular provision must prevail; and, if both cannot apply, the particular provision will be treated as an exception to the general provision. But the rule that a particular provision prevails over a general one only applies where the two conflict". (Lewis' Sutherland Statutory Construction; see also 36 Cyc. 1130.)

Section 14 of the act, as already noted, provides that the State Highway Engineer shall be the chief executive officer of the department. The same section provides that he shall "have charge of all employes of the department and issue rules and regulations for their guidance", and that he shall "appoint all persons to positions in the department". While Section 15 provides that:

> "All employes of the State Highway Department not otherwise provided for in this act shall be employed and discharged by the Highway Engineer at his pleasure. The duties of all employes in the department shall be such as are assigned them by the Engineer."

It will be noted that the positions now in question are "not otherwise provided for" in the act, and are therefore within the purview of Section 15.

Section 12 provides, *inter alia*, that "The Highway Advisory Board shall have the following powers and duties: * * * To

formulate and adopt regulations governing the qualifications for the employment of all persons in the State Highway Department and with the approval of the Governor fix a schedule of salaries, and to inquire into the official conduct of any person in the department." At this point it may be stated that we are advised that some time after this act went into effect a schedule of salaries was in fact fixed by the Board with the approval of the Governor, and that such schedule included the salaries of the positions now in question. The courts would probably hold that such schedule, having been so fixed by the Board with the approval of the Governor, could not thereafter be changed except by joint action on the part of the Board and the Governor. Upon this proposition the case of *Commissioners vs. Morning*, 72 Colo. 200, is very much in point. In view of these plain and specific provisions giving the State Highway Engineer charge of all employes of the department with power to issue rules and regulations for their guidance, to assign to them their duties and to employ and discharge them at his pleasure, and in view of the provision making the fixing of their salaries a matter of joint action on the part of the Governor and the Advisory Board, I think that it is extremely doubtful if the Governor has the power to abolish the State Maintenance Department and to transfer the duties thereof to the Engineering Department and, indeed, my best judgment, from the study I have thus far been enabled to give this subject, is that he cannot do so. However, I recognize the fact that the point has never been passed upon by our courts, that it is fairly debatable, and that the courts might arrive at a different conclusion. As a matter of merited protection to the disbursing officers of the State government, it has been the uniform policy of this office, at least during the present administration, to advise such officers to refer to the courts for final solution all questions involvnig the disbursement of public funds whenever the legality of such expenditures is reasonably debatable. I feel that I should adopt that course in this instance.

Your second question is—"Has the Governor authority to abolish the purchasing department and to transfer the duties thereof to the chief clerk, and has the Governor authority to abolish the office of Auditor."

This question has been fully answered by what has already been said with reference to the Maintenance Department, and my conclusions and reasons therefor are the same as above set forth.

Your third and fourth questions are as follows, respectively:

> "3. In view of the references just made, has the Governor authority to control the expenditures made from the contingent fund for the purchase of equipment, or to determine, or to define, either by himself or in conjunction with the State Highway Engineer, the expenditures of any of the moneys in the Highway Fund?
>
> "4. Has the Governor any authority or direction

with reference to the expenditures of Highway funds, except to approve the budget as made up from data submitted him by the Highway Advisory Board?''

I assume that these questions have reference to the following concluding paragraphs of the final budget as made up by the Governor:

''The contingent fund may be used to meet emergencies and contingencies as determined by the State Highway Engineer and the Governor and be expended from time to time under their direction.

''Any necessary equipment for use in state maintenance of highways may be purchased out of the contingent fund, or any other available fund, as from time to time may be determined by the State Highway Engineer and the Governor, and be so purchased and paid for under their direction.

''The contingent fund may also be used to meet the expense of any necessary extension of state highway construction, or any additional necessary maintenance, as determined from time to time by the State Highway Engineer and the Governor.

''Any excess in receipts over the estimated amounts, any surplus remaining in any of the appropriations and any excess of estimated balances carried over from the preceding year, shall be transferred to the contingent fund, for use when so carried over, as and under authority hereinbefore set forth; it being intended hereby to include all excess moneys, if any, from each and every highway project except federal aid funds.

''Any deficiency of receipts below the estimate, any deficiencies in appropriations or any deficit in any estimated balance carried over from the preceding year, may be made up so far as possible, from the contingent fund.''

These paragraphs deal largely with the ''contingent fund'' for which $348,500 is set aside in the budget.

In my opinion the provision in Section 12 authorizing the Governor to ''make up the final budget therefrom'' gives the Governor very broad and general power over the details of the budget; that this power is limited only by certain specific provisions in the act, some of which have already been pointed out. Section 29 requires the budget to show how much it is proposed to expend for administrative purposes ''which shall not exceed four per cent of the estimated funds available.'' In view of this provision, I do not think the Governor and the Highway Engineer could authorize the use of such an amount of money out of the contingent fund for administrative purposes as would bring the total expended for administrative purpose above the limit of four per cent fixed by

this Section. Said section 29 also limits the amount to be expended for engineering and supervision of any construction to ten per cent of the total cost of such construction. The Governor and the Highway Engineer could not authorize the use of the contingent fund to enhance this amount, for the limit of ten per cent is definitely fixed by the statute. It is true that one purpose of the requirement of an annual budget is "that the people of the state may have full knowledge as to how much money there may be available in a given year for the work of the Department and how it is proposed to spend the money." (Sec. 29). It follows that the annual budget should always set forth as specifically as practicable how the available funds are to be used. But the propriety of a contingent fund in an amount that bears a reasonable proportion to the entire fund to be expended has always ben recognized. And I think that the general power vested in the Governor to make up the final budget necessarily includes the power to prescribe how that fund, and any incidental accretions thereto, shall be expended; subject of course to the limitations already pointed out.

Your fifth question is general, and I think the matters covered by it have already been sufficiently disposed of.

Yours respectfully,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy.

132. CRIMINAL PROCEEDURE

To Mr. B. M. Erickson, Asst. District Attorney, Jan. 11, 1926.

Sections 5839, 5843, 5846, C. L. 1921, relative to the preparation of jury lists are directory rather than mandatory.

See Colacino v. People, ——Colo.——

133. AGRICULTURAL COLLEGE

To Dr. Charles A. Lory, Jan. 11, 1926.

There is no authority of law to warrant the State Agricultural College in appropriating funds for the furnishing of any part of the proposed Community Hospital at Fort Collins. Only such moneys may be spent by the Board as are appropriated for special purposes.

Neither is there any authority for assessing a hospital fee against the students of the college; nor is there any provision made by law for the care of students who become ill while attending college.

134. COUNTIES

To Fred D. Blackmer, County Commissioner, Jan. 12, 1926.

A county cannot legally expend county funds for the improvement of highways located within incorporated towns.

135. HOME PRODUCTS LAW

To Governor Morley, Jan. 13, 1926.

Under the statute giving preference to Colorado products, governing boards of institutions should make full and complete inquiry as to the quality and price of home products before awarding contracts to foreign concerns for the furnishing of supplies or materials.

136. STATE FAIR COMMISSION

To D. A. Jay, January 16, 1926.

In the absence of a statute empowering departments of the State government to employ private counsel, the duty to conduct litigation wherein such departments are interested devolves upon the attorney general of the State.

Fergus v. Russell, 270 Ill. 304.

In re House Bill 107, 21 Colo. 32.

People v. Casias, 73 Colo. 423.

137. SOLDIERS AND SAILORS HOME

To Julia E. Killam, Jan. 16, 1926.

Duty of Secretary of Board

Under Sec. 701, C. L. 1921, it is the duty of the Secretary of the Board of Control of the State Soldiers and Sailors Home to examine all vouchers and attest such as have been properly drawn and signed by the president of the Commission.

138. UNIVERSITY OF COLORADO

To Frank H. Wolcott, Jan. 20, 1926.

Nuisances

A person moving into the vicinity of a power plant would have no legal right to complain of the operation of the same as a nuisance.

Platte, etc., Ditch Co. v. Anderson, 8 Colo. 131.

29 Cyc. 1163.

29 Cyc. 1210.

139. SCHOOLS

To Mary C. C. Bradford, State Superintendent, Jan. 21, 1926.

S. L. 1923, page 566, providing that no school district shall share in the distribution of "state aid" which has not made a special school tax levy of three mills or more for the year is mandatory and aid cannot be given a district which does not comply.

140. COLORADO GENERAL HOSPITAL

To Edgar A. Bocock, Superintendent, Jan. 25, 1926.

The number of patients to be received by the hospital is limited only by the hospital's capacity. Cases cannot be treated without charge. Patients must be residents of this state but there should be no discrimination between counties.

141. STATE HIGHWAY DEPARTMENT

To the Highway Advisory Board, January 27, 1926.

The State Highway Advisory Board, the State Highway Engineer and the Governor should co-operate to formulate the annual budget for the Highway Department.

142. INDUSTRIAL SCHOOL FOR BOYS

To Governor Clarence J. Morley, Feb. 2, 1926.

Opinion as to what persons are legal members of board of control of the State Industrial School for Boys.

143. STATE BOARD OF LAND COMMISSIONERS

To Perry E. Williams, Feb. 2, 1926.

The State Land Board has a first claim on all improvements placed upon state land until the certificate of purchase is entirely paid out and patent issued.

144. WORKMEN'S COMPENSATION

To Industrial Commission, Feb. 2, 1926.

An employer having once insured under the Workmen's Compensation Act is subject to its provisions, and cannot withdraw without written notice to the Commission, as provided by Sec. 17, irrespective of the number of his employes.

145. JUSTICE OF THE PEACE

To Clarence M. Smith, County Judge, Feb. 3, 1926.

A justice of the peace has no jurisdiction to act as a probation court.

146. COUNTIES

To Harry Behm, County Attorney, Feb. 3, 1926.

There is no Colorado statute requiring a county to send for an insane person confined in another state.

147. STATE FAIR BUILDINGS

To Charles Davis, Auditor, Feb. 3, 1926.

Insurance

The premium on a policy of insurance written on one of the State Fair buildings in August, 1923, for a period of three years, is probably a valid obligation contracted by the Commission, but cannot be met until the legislature has made provisions for payment.

148. CHATTEL MORTGAGES

To A. C. Archibald, Feb. 4, 1926.

Under Ch. 85, S. L. 1925, which amends Secs. 5092 and 5093, C. L. 1921, the safe thing to do would be to consider chattel mortgages executed before the new law became effective, as not being affected by the new law, and it would be safer for the holders of such mortgages to renew the same or take possession of the mortgaged property within the 30 days allowed by the old law.

Under the doctrine recognized in Fisher v. Hervey, 6 Colo. 16, the new act would not be within the prohibition against retroactive laws, because it is merely remedial; but this is a question for the courts.

149. CITIES AND TOWNS

To Lee E. Jones, Feb. 4, 1926.

Traffic Regulations

Regardless of the provisions of Paragraph E, Sec. 4 of Ch. 141, S. L. 1921, it is within the province of incorporated towns and cities to prescribe regulations for the use of vehicles upon the streets thereof, since the statute does not purport to bring city streets within its purview.

150. INSURANCE

To George B. Boutwell, Feb. 4, 1926.

Under Ch. 164, S. L. 1925, all fire insurance on State buildings in force and paid for upon the passage of the act shall be allowed to run to the date of its expiration, but shall not be renewed.

The word "passage" as used in this act means approval.

See Rio Grande R. R. Co. v. Breneman, 45 Colo. 264.

151. STATE AGRICULTURAL COLLEGE

To Dr. Lory, Feb. 5, 1926.

Funds erroneously withdrawn from trust funds held by the College may be repaid by drawing upon the College funds, with the consent of the State Auditor and Treasurer.

152. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, Feb. 9, 1926.

Section 2494, C. L. 1921, providing that publication of the annual statements of insurance companies shall be made in a newspaper published at the state capital is binding upon the commissioner until repealed by the legislature or declared invalid by the courts.

153. HIGHWAY DEPARTMENT

To Charles Davis, Feb. 10, 1926.

Payment of warrants on claims not in dispute

The State Auditor and Treasurer are fully authorized to issue and pay warrants representing expenditures under the Highway Budget, insofar as no controversy exists respecting such expenditures, reserving for court decision such matters as are in controversy.

154. TAXATION

A county treasurer is required to sell land for all delinquent taxes thereon, whether delinquency covers one year or a number of years.

A tax sale later than the statutory time is void unless some reason appears for postponement of the sale.

To John I. Palmer, County Attorney, February 11, 1926.

Dear Mr. Palmer:

Some time ago you furnished the Colorado Tax Commission with a copy of the complaint filed in your District Court in the case of *Mildred B. Newmyer v. Tax Service Corporation, et al.*

In your letter of transmittal you suggested that the tax commission might be interested in this litigation and that you would like at least the opinion of its attorney on the legal questions raised. This case was discussed with you informally when you called at this office several weeks ago. The facts in the case are, very briefly stated, as follows:

In December, 1923, the plaintiff bought certain lands in your county at tax sale for the taxes of 1919. In February, 1925, the defendant, Tax Service Corporation, bought these lands at a tax sale for the taxes of 1914 and thereafter paid the taxes of 1915, 1916, 1923 and 1924 and caused such payments to be endorsed upon its tax certificate. In October, 1925, plaintiff sold her tax certificate and thereafter, during the same month, purchased the property from the former owner.

In her complaint the plaintiff offers to pay the taxes of 1923 and 1924, but contends that the lien for the taxes of 1914, 1915 and 1916 have been wiped out by the sale in 1923 for the tax of 1919, at which sale the plaintiff was the tax purchaser, as above stated. The question, as I take it, with which the county is concerned is whether the county would be obliged to refund the taxes of 1914, 1915 and 1916 to the Tax Service Corporation if the plain-

tiff gets a decree to the effect that the taxes for those years were wiped out by the tax sale of 1923 for the taxes of 1919.

I am satisfied that in no event would the county be required to make any refund to the Tax Service Corporation. (See *Elder v. Chaffee County*, 33 Colo. 475; *Mitchell v. Minnequa Town Co.*, 41 Colo. 367.)

Section 7444, C. L. 1921, provides for the refund of taxes to the tax sale purchaser in some instances, but such refunds are only provided for where a sale has been had of land upon which no tax was due at the time, while in this case the taxes of 1914 were apparently due at the time of the delinquent tax sale. So I do not think that the Tax Service Corporation comes within the requirements of said Section 7444.

Notwithstanding the cases of *Bennett v. Denver*, 70 Colo. 78, and *Whitehead v. Desserich*, 71 Colo. 327, I think it is doubtful if the tax sale of 1923 for the taxes of 1919 had the effect of cutting off the lien of the taxes for 1914, 1915 and 1916.

Under our statutes the treasurer is required, in conducting a delinquent tax sale, to sell land for all delinquent taxes thereon whether the delinquency covers one year or a number of years. This is apparent from Sections 7402, 7416 and 7425. I find no Colorado case directly in point, but the authorities seem to be in conflict as to the effect of a tax sale for delinquent taxes of one year only, in the face of a statute that requires the sale to be made for all delinquent taxes.

The case of *Preston v. Van Gorder*, 13 Ia. 250, is based upon statutes very similar to ours, and that case holds that, where lands were sold for delinquent taxes of one year such lands became freed from delinquent taxes of prior years. But the State of Nebraska, in a long line of decision, takes a contrary view; and the Supreme Court of that State holds that under statutes requiring tax sales to be made for all delinquent taxes, a sale for the delinquent tax of one year only is void where taxes for preceding years were also delinquent. (See *Tillotson v. Small*, 12 N. W. 201; *Baker v. Hume*, 120 N. W. 1131; *Adams v. Osgood*, 60 N. W. 869; *Medland v. Connell*, 77 N. W. 437.)

The *Adams case* mentions and severely criticises the *Iowa case* above mentioned. If you will read these Nebraska cases, you will observe that they seem to be much better reasoned than the Iowa case. This is especially true of the Adams case.

In neither of the Colorado decisions above mentioned was there any question raised or discussed as to the effect of a sale for delinquent taxes of one year only when there were delinquent taxes of prior years.

It seems to me that you should contend that the Newmyer certificate of 1923 and the taxes of 1919 are void, and therefore did not cut off the lien of the taxes of 1914, 1915 and 1916, and that therefore the county could not in any event be liable for any refund to the Tax Service Corporation.

I note that the Newmyer sale was in December and the Tax

Service Corporation sale in February. Our Supreme Court in a recent case (*Hamer v. Glenn Inv. Co.*, 75 Colo. 423) held that a tax sale later than the statutory time is void unless some reason appears for the postponement of the sale, and it may be that under this decision both of these sales were void.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy.

155. SCHOOLS

To M. R. Thomas, County Superintendent, Feb. 24, 1926.

A school board cannot pay more than $75.00 per month per teacher out of the general fund. Any amount in excess of $75.00 should be paid out of the special fund.

156. STATE ENGINEER

To C. C. Hezmalhalch, Feb. 24, 1926.

Although irrigation and drainage districts have been declared to be public corporations, yet such districts are organized primarily for the profit of the land owners within the district, and do not stand on same footing as municipal corporations, counties, school districts, and are not exempt from the payment of fees for filing maps and statements in the office of the State Engineer.

157. TEACHERS' RETIREMENT FUND

To Mary C. C. Bradford, March 3, 1926.

A retirement fund for teachers, to be created partly by public moneys and partly by moneys deducted from teachers' salaries, is not repugnant to the Colorado Constitution.

No Colorado cases. Citations from other states.

158. COUNTY COURT

To James F. Sanford, County Judge, March 5, 1926.

Section 5331, C. L. 1921, does not apply to physicians' bills, but a county judge has the discretion to allow such bills for the last illness even though by so doing they cover a period greater than thirty days before death.

159. GAME AND FISH DEPARTMENT

To R. G. Parvin, March 6, 1926.

Under Sec. 1445, C. L. 1921, game or fish held in private enclosures or private lakes, under license from State, but which are privately owned, are not to be considered game and fish within

the meaning of Secs. 1466, 1468, 1469 and 1471, C. L. 1921, and no fee is properly chargeable when the same are transported out of the State.

160. HIGHWAY DEPARTMENT

The Governor may remove members of the State Highway Advisory Board, but in so doing he must assign some substantial cause of removal and accord the accused member reasonable opportunity to be heard in his defense.

To Hon. Clarence J. Morley, Governor of Colorado, March 11, 1926.

Dear Governor:

In your letter of the 26th ult., you asked my opinion as to your right to remove members of the State Highway Advisory Board "and particularly as to the conclusiveness of the cause *assigned* for such removal or removals upon the exercise of the right."

The Highway Law provides that "Members of the Board may be removed by the Governor for cause." (S. L. 1921, Ch. 136, Sec. 9.) The question, therefore, is, What is the scope and extent of the power of removal vested in the Governor by this particular statute?

The Colorado cases most nearly in point are *Trimble v. People,* 19 Colo. 187, and *People v. Martin,* 19 Colo. 565, which follows and approves the Trimble case.

The statute involved in these cases provided that members of the fire and police board of the city of Denver might be removed by the Governor "at any time for cause, to be stated in writing, but not for political reasons." In the Trimble case the court held that, under said statute, the judgment of the Governor as to the sufficiency of the cause for removal was conclusive, provided that the cause be stated in writing and be other than political, and that removals, under that statute, might be effected without notice or hearing. We quote from the opinion of the court:

> "Whatever may be the rule as to those officers, the removal of whom for certain specified causes is provided by other statutes or by the constitution, the governor, under the statute before us, is not required, as a prerequisite to removal, to institute an investigation in the nature of a judicial or *quasi*-judicial inquiry. The investiture of the power of removal here given is restricted in but two particulars; it must not be exercised for political reasons, and the cause of removal must be stated in writing. In considering removals under this act we must assume that the law-making body was of the opinion that the requirement that the cause of removal should be stated in writing was the only check necessary to prevent an arbitrary and oppressive abuse of the power.
>
> "If removals were only authorized for certain speci-

fied reasons a question of procedure might have been presented more difficult of solution. In this instance the cause stated does not import any wrong doing to the officer, and while it may not be such as would have had weight with a court, it was deemed sufficient by the governor, and his judgment is final and decisive. The office of police commissioner is created by the statute; it was accepted by the relator under the conditions imposed by the act, among which was that the incumbent should hold it subject to removal by the governor for cause.

"Under the statute the cause that may be sufficient to warrant removal is to be determined by the governor, and no mode of inquiry being prescribed, he is at liberty to adopt such mode as to him shall seem proper, without interference on the part of the courts. The governor was not bound to examine witnesses under oath, or otherwise, although it was eminently proper that he should do so. He might have resorted to other means for ascertaining whether a cause of removal existed; and the refusal to allow counsel is not a fatal objection to the governor's action, as he might have proceeded *ex parte*.

"The governor having determined that a sufficient cause for removal existed, and having exercised the power confided to him, relator is without remedy in this proceeding. It is the duty of the courts to uphold the executive power as it has been conferred by the legislature."

The Martin case, as above stated, follows the Trimble case, and holds further that the written statement of the Governor of the cause of a removal under said statute is the exclusive and conclusive proof of the cause for making the order of removal, and that in a *quo warranto* suit to test the validity of the order of removal evidence that such order was made for some cause other than that stated in the order of removal will not be admitted.

The question that now arises is—What is such "cause" as would warrant the removal of a member of the Highway Advisory Board? It will be noted that in the Trimble case the Court said: —"The statute only requires that the reason for removal shall be other than political and that it shall be stated in writing. The words 'but not for political reasons' are words of limitation, and could have been deemed necessary by the legislature for but one reason, to-wit: that otherwise, the Governor might remove for political purposes. *The intent on the part of the legislature to confer the power of removal for any other cause satisfactory to the governor, is made plain by the words of limitation.*" (19 Colo. p. 196). Thus, the court took the view that, because of the words of limitation, the word "cause" in the statute then under consideration meant *any cause*, not political, *that was satisfactory to the Governor*. The Highway Act, however, in conferring the power of removal, merely says that Board members may be removed "for

cause'' and the Act affords no means of determining what was meant by ''cause'' as the term is therein used. We shall, therefor, refer to other authorities bearing upon this question. Section 396, Throop on Public Officers reads as follows:

> ''So it has been held, that where a statute gives a power of removal 'for cause', without any specification of the causes, this power is of a discretionary and judicial nature; and unless the statute otherwise specially provides, the exercise thereof cannot be reviewed by any other tribunal, with respect either to the cause, or to its sufficiency or existence, or otherwise. Under similar statutory provisions, and even in some cases where the statute specifies the cause of removal, it has been ruled, in other American decisions, that the removing authority is the sole and exclusive judge of the cause, and the sufficiency thereof; and that the courts cannot review its decision in any case where it had jurisdiction.''

In the case of *People, ex rel. Gere et al., vs. Whitlock et al.,* 92 N. Y. 191, the court had under consideration a statute providing that the mayor of a city might remove a police commissioner ''for any cause deemed sufficient to himself.'' The court there said:

> ''No opportunity to be heard is given, and it is enough if the mayor thinks there is sufficient cause. It may or may not exist, except in his imagination, but his conclusion is final. The diligence of appellants' counsel has found no case like it, and those cited by him do not apply. They require either the actual existence of 'cause,' or 'sufficient cause' for removal, and so by implication impose investigation before action, or by express language give a hearing to the accused member or official. Here the removal is to be determined summarily, and is intrusted to the unrestrained discretion of the mayor.''

In the case of *State vs. Hay,* 45 Neb. 321, the court had under consideration a statute providing that the superintendent of an asylum for the insane might be removed by the Governor ''for malfeasance in office, or other good and sufficient cause.'' The court there said:

> ''We quite agree with counsel that the governor is not by the terms of the act here involved invested with arbitrary powers. The language 'other good and sufficient cause' should be held to mean causes of like nature and affecting the competency or fitness of the respondent for the position he holds, or, in the words of Judge Dixon, construing a similar statute in *State v. McGarry, supra,* (21 Wis. 503) 'the cause must be one which touches the

qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties.' ''

In *State v. McGarry,* 21 Wis. 502, the statute construed provided that the board of supervisors might remove the inspector of the house of correction for "incompetency, improper conduct, or other causes satisfactory to said board." The court said:

> "The board may remove for incompetency, improper conduct or other cause *satisfactory* to the board. By 'other cause' we understand other *kindred* cause, showing that it is improper that the incumbent should be retained in office. If the board should attempt to remove him for some cause not affecting his competency or fitness to discharge the duties of the office, that would be an excess of power, and not a removal within the statute. It would be equivalent to removing him without assigning any cause—a merely arbitrary removal, which the statute does not authorize. The cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties; and when such a cause is assigned, the power to determine whether it exists or not is vested exclusively in the board, and its decision upon the facts cannot be reviewed in the courts. The only question of judicial cognizance is as to whether the board has kept within its jurisdiction, or whether the cause assigned is a cause for removal under the statute."

In *State v. Common Council*, 53 Minn. 238, it appears that a city charter provided that members of a board of fire commissioners might be removed by the common council "for sufficient cause," provided that charges be preferred and an opportunity to be heard be afforded the members sought to be removed. With reference to the meaning of the word "cause," as so used in the charter, the court said:

> " 'Cause,' or 'sufficient cause,' means 'legal cause,' and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it."

As already noted, you ask to be advised particularly "as to the conclusiveness of the cause assigned" for the removal of a member of this board. In an exhaustive note on "Power of Court to review action of Governor in removing officer" in 39 L. R. A. (N. S.) 788 many court decisions are cited in support of the statement of the author of the note that—

> "The cases make it plain that the courts will not review the governor's determination that the incumbent's neglect or misconduct is such as is made a ground for removal. But it seems that the courts will look into the questions of the governor's power and jurisdiction, and of the legality or *existence* of the ground assigned by the governor."

In *Alderman of Denver vs. Darrow,* 13 Colo. 460, the Court said that, upon review by writ of *certiorari* of the action of a board of aldermen in removing one of its members, "It is clear that the courts are confined to the question of jurisdiction, and the regularity of its exercise."

In *State vs. Hay,* cited above, the court said:

> "The question to which most prominence is given in the argument was suggested in *State v. Smith*, 35 Neb. 13, viz., whether the power of removal for cause of an officer holding for a fixed and definite term is judicial in the sense that such officer is entitled to have the question of cause determined by the courts in the first instance or by appropriate appellate proceeding. The conclusion reached, although not expressed in the case cited, was that such power is in its proper sense an administrative rather than a judicial function, and that orders made in the exercise thereof are not reviewable by the courts; and a re-examination of the subject at this time has confirmed that conclusion. A review of the cases cited in support of the conflicting views upon this question is deemed unnecessary in this connection. It is sufficient that the conclusion above stated is in accord with the decided weight of authority and supported by the more satisfactory reasoning."

In *State, ex rel., v. Hawkins,* 44 O. St. 98, it appears that the governor had removed a police commissioner under a statute providing that "for official misconduct any commissioner may be removed by the governor." The validity of the governor's order of removal was attacked in a *quo warranto* proceeding. The court said:

> "The next question is as to whether the exercise of the power can be reviewed in this court. As the governor had the power to remove, and as in exercising it he did not act in a judicial capacity within the meaning of the

constitution, it would seem to follow as a corollary, that the exercise of the power by him can not be inquired into in this court, and held for naught in a proceeding in *quo warranto,* simply because he may have erred in exercising the power reposed in him by the statute. The only question that this court can consider is, whether charges involving official misconduct were preferred, of which the parties had notice, and that he acted upon these charges, and removed the respondents, for the reasons stated in the charges. The law as to this question is, as we think, accurately stated by Dixon, C. J., in *State v. McGarry, supra:* "The cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties; and when such a cause is *assigned*, the power to determine whether it exists or not is vested exclusively in the board, and its decisions upon the facts can not be reviewed in the courts. The only question of judicial cognizance is as to whether the board has kept within its jurisdiction, or whether the cause *assigned* is a cause for removal under the statute."

In *State v. Common Council*, cited above, the Supreme Court of Minnesota held that, under a statute providing for the removal of a public officer for "sufficient cause," the "*sufficiency and reasonableness* of the cause of removal are questions for the courts," and that on writ of *certiorari* the courts would determine "whether the charges presented were *sufficient in law* to constitute a cause of removal." The court, however, further said that "the degree of incompetency or inefficiency which amounts to sufficient cause for removal must of necessity, within certain established limits, rest somewhat in the sound discretion of the officer or body in whom the power of removal is vested."

In the later case of *State, ex rel., v. Eberhart*, 116 Minn. 330, the court held that the action of the governor in removing an officer for malfeasance and nonfeasance would be reviewed on writ of *certiorari.* The court said:

> "The specifications and evidence must relate to the administration of the office,—must relate to something of a substantial nature directly affecting the rights and interests of the public. Charges which directly involve the qualifications of the officer as a fit person to hold office involve the rights and interests of the public. The decision will not be reversed if there is any evidence of a legal and substantial basis reasonably tending to support it. Rulings on evidence may be considered, but a strict compliance with legal procedure is not required."

It remains to be considered what procedure is required to be

followed in order to effect a valid removal of a member of this board.

In the Trimble case it appears that the Governor accorded a hearing to the officer charged but refused to allow counsel to be heard in his behalf. The Court there said, as already shown, that "the refusal to allow counsel is not a fatal objection to the governor's action, as he might have proceeded *ex parte.*" The Court, however, had already said that, "In considering removals under this act we must assume that the law-making body was of the opinion that the requirement *that the cause of removal should be stated in writing* was the only check necessary to prevent an arbitrary and oppressive abuse of the power."

In *Alderman of Denver v. Darrow,* cited above, the Court quoted with apparent approval the following from Dillon on Municipal Corporations:

> " 'Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. But where the appointment is during good behavior, or where the removal can only be for certain specified causes, the power of removal cannot be exercised, unless there be a charge against the officer, notice to him of the accusation, and a hearing of the evidence in support of the charges, and an opportunity given to the party of making a defense.' 'The proceeding, in all cases where the amotion is for cause, is adversary or judicial in its character; and, if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed.'
>
> " 'First, the officer is entitled to a personal notice of the proceeding against him and of the time when the trial body will meet. * * * But it should contain the substantial fact that a proceeding to amove is intended. * * * There must be a charge or charges against him specifically, stated with substantial certainty, and reasonable time and opportunity must be given to answer the charges and to produce his testimony; and he is also entitled to be heard and defended by counsel, and to cross-examine the witnesses, and to except to the proofs against him. If the charge be not denied, still it must, if not admitted, be examined and proved.' "

In *People, ex rel., v. Carver,* 5 Colo. App. 156, the Court had under consideration a statute providing that the board of county commissioners might remove the general road overseer for the county "for reasons satisfactory to them." It was there held that the overseer might be removed without charges, notice or hearing. We quote from the opinion of the court:

"The position of relator's counsel is that it was not competent for the board to make the removal without notice and hearing. If the statute authorized the board to remove an incumbent for certain specified causes, or for due cause, or sufficient cause, or limited their authority to remove by some equivalent expression, an inquiry would be necessary, and the officer would be entitled to notice of the charges against him, and of the time and place of hearing. But the law invests the board with the power of removal for any reason satisfactory to them. Such reason may be an entirely insufficient one, or amount, practically, to no reason at all; it may be mere caprice, but, whatever the reason may be it cannot be inquired into, it need not even be stated, and the action of the board in the case is final. The effect of the language is to vest in the board a power, the exercise of which is absolutely discretionary with them; and it is well settled that where an appointment is during pleasure, or for a fixed period with a discretionary power of removal, the office may be vacated and the removal made *ex parte*."

In *Benson v. People*, 10 Colo. App. 175, the court said:

"The statute confers no power of amotion upon the governor except for causes which it specifies. The authority is not discretionary, but is controlled by the language of the law conferring it; and it cannot be validly exercised except in conformity with the statute. Where a removal can be made only for some specified cause, there must be a charge against the officer whose removal is proposed; there must be something in the nature of a judicial investigation of the charge; notice must be given to the accused of what he is charged with, and of the time and place of the hearing; and he must be accorded an opportunity to make his defense."

In *Matter of Carter*, 141 Calif. 314, it appears that a city charter provided that the mayor might remove the fire commissioner "for cause," but that in case of such removal he "shall give written notice thereof, stating the cause, to the person removed, and shall immediately notify the common council of his action and the reasons therefor." The court held that under such a charter provision, the mayor might remove the fire commissioner without notice or hearing, and that his action in so doing was not the exercise of a judicial function and was not reviewable by writ of *certiorari*.

In Mechem on Public Officers, Sec. 454, the rule is laid down as follows:

"In those cases in which the office is held at the pleasure of the appointing power, and where the power of removal is exercisable at its mere discretion, it is well

settled that the officer may be removed without notice or hearing.

"But on the other hand, where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal can not, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense."

In *State, ex rel., vs. Grant*, 14 Wyo. 41, 1 L. R. A. (N. S.) 588, we find that a statute reading as follows was construed by the Court, viz.:

"Any officer or commissioner of the State of Wyoming who shall hold his office or commission by virtue of appointment thereto by the governor, or by the governor by and with the advice and consent of the senate, may be removed by the governor from such office or commission for maladministration in office, breach of good behavior, wilful neglect of duty, extortion, habitual drunkeness, or any other cause deemed by the governor to justify and warrant such removal; Provided, reason for such removal shall be filed in the office of the secretary of state in writing, subject to inspection by any person interested."

The court held that, under such statute, the governor might remove a superintendent of a water division without notice or hearing. We quote that part of the opinion which shows the reason for the court's conclusion:

"From an examination of the authorities, therefore, it seems correct to say that when the legislature has conferred power on the governor to remove an appointive officer having a definite term, and the statute does not provide the procedure, it will not be presumed that such removal may be made without notice and a hearing; but, if the authority is expressly given to proceed summarily, no such notice is necessary. If, therefore, the statute under which the removal was made in this case had closed at the semicolon before the proviso, it might be a question whether notice to the officer and a hearing on charges might not be required. But the legislature, having declared that removals may be made, proceeds to prescribe the method or the conditions under which such removals may be made. Having conferred the power upon the governor in language which is plenary, it adds: 'Provided, reason for such removal shall be filed in the office

of the secretary of state in writing, subject to inspection by any person interested.'—thereby declaring the express conditions and limitations under which the governor may act. Having entered upon the realm of limitation, the enumeration of one condition precludes the idea that there should be others not expressed. *Expressio unius est exclusio alterius.* To our minds the language of the proviso is inconsistent with the idea of a hearing. The sole restraint upon the action of the governor is the filing of his reasons for the removal, and the consequent check of public opinion.''

It is of interest to note that the reasoning of the Wyoming Court in the above case was very similar to that of our Supreme Court in the Trimble case. Both courts seem to have adopted the view that where a statute conferred upon the governor the right to remove a public officer for cause but annexed an express limitation upon the exercise of such right, such express limitation would exclude the implication, which otherwise might have arisen, that the accused officer was entitled to notice and hearing.

My conclusions, based upon the above authorities, are as follows:

I. That the Highway Act does not give the Governor unlimited or arbitrary power to remove members of the Highway Advisory Board, but that, under said Act, the Governor may, at least within reasonable limits, exercise his sound discretion in determining what facts would constitute sufficient cause for the removal of a member of said board.

II. That the removal by the Governor of a member of said board would be upheld by the Courts of this State, provided:

(A) That the cause assigned for such removal be one that substantially affects the competency or fitness of the member to properly discharge the duties of his office and shows, or reasonably tends to show, that he is not a fit or proper person to hold the office.

(B) That any member sought to be removed be notified of the cause assigned and be afforded reasonable opportunity to be heard by himself and counsel in his defense.

(C) That upon the hearing evidence be adduced proving, or, at least, reasonably tending to prove the existence of the cause assigned.

It may be that our Courts would hold that, under the Trimble case, the power of the Governor to remove members of this board is not subject to the limitations or qualifications, or any of them, above indicated. But, because of the fact that the statute construed in that case is different in its terms from the one now under consideration, I have felt that the Trimble case is not wholly in

point, and that this opinion should, therefore, be based, not alone upon that case, but upon the general current of authority upon the subject of executive removals of public officers.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

161. SCHOOLS

To Miss Flora A. Allison, March 11, 1926.

Under Section 7133, C. L. 1921, the proceeds of forfeited recognizances should be put into the ordinary fund of the county and the clear proceeds of all fines collected for breach of the penal law should be put into the school fund.

162. COUNTIES

To Ed. Whitney, County Commissioner, March 11, 1926.

The board of county commissioners cannot transfer a surplus in the Poor Fund or the Fair Fund to the Road Fund or Ordinary Fund but may so transfer a surplus in the Contingent Fund.

163. CITIZENSHIP

To M. C. Hinderlider, State Engineer, March 13, 1926.

If an alien has resided in this State for the requisite period of one year or more and takes out his final naturalization papers, he, at once, becomes a qualified elector.

164. JUSTICES OF THE PEACE

To Wm. P. Burn, Justice of the Peace, March 16, 1926.

A justice of the peace has no power to pardon a prisoner.

165. SCHOOLS

To Mr. J. Harry Abbett, March 20, 1926.

Under Section 8333, C. L. 1921, the school board has the power to determine the number of teachers to be employed and the length of the term and with this matter neither the county superintendent or county commissioners have anything to do.

A deficiency in the funds provided for teachers and salaries may be secured from "state aid" provided that the district has made a special levy of at least three mills. See S. L. 1923, page 566.

166. DISTRICT ATTORNEY

The Governor has no power to remove a district attorney or sheriff from office.

To Hon. Clarence J. Morley, Governor of Colorado, March 20, 1926

Dear Governor:

In your letter of the 18th inst., you ask to be advised as to what powers, if any, are given by law to the Governor to remove a district attorney or a sheriff.

Section 6, Article IV of the State constitution provides that "the Governor shall nominate, and by and with the consent of the Senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and *whose appointment or election is not otherwise provided for*, and may remove any *such* officer for incompetency, neglect of duty or malfeasance in office."

The offices of district attorney and of sheriff are established by the constitution (See Sec. 21, Art. VI, and Sec. 8, Art. XIV), but the constitution also provides for their *election*, so they are officers whose election is "otherwise provided for." Hence, they are not *such* officers as may be removed by the Governor under this section.

Sec. 2 of Article XIII of the State constitution provides that —"The Governor and all other State and *judicial* officers * * * shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office, but judgment in such cases shall only extend to removal from office and disqualification to hold any office of honor, trust or profit in the State", etc.

It may be that the district attorney would be regarded as a *judicial* officer within the meaning of the constitution, since that office is created by Sec. 21 of Art. VI and that article is entitled, and deals wholly with, the "Judicial Department". In that event the district attorney would be subject to removal by impeachment.

Sec. 3 of Art. XIII provides that "All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office *in such manner as may be provided by law.*"

There is no statute authorizing the Governor to remove either district attorneys or sheriffs.

Sec. 6818, C. L. 1921, provides that:

> "Any judge of the county court, justice of the peace, clerk, sheriff, constable, city marshal or other public officer authorized by law to issue, serve or execute any execution or other legal process and who shall either charge or receive any money or other thing of value for omitting, or delaying to issue, serve or execute such process, or to perform any other duty whatever appertaining to his particular office, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred nor more than five hundred dol-

lars, or imprisoned in the county jail not less than thirty days nor more than six months; *Provided, however,* That nothing in this act contained shall debar the said officers of the right to demand and receive their legitimate fees in advance; that in addition to the penalties herein prescribed, such officer, upon conviction as aforesaid, shall be deemed to have forfeited his said office, and the same shall be declared vacant; and in addition thereto, such officer so convicted as aforesaid, shall be disqualified from holding a like office of responsibility and trust in this State for a period of two years from the date of such conviction."

And Sec. 6819, C. L. 1921, provides that:

"Every clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, or attorney general, or prosecuting attorney, who shall be guilty of any palpable omission of duty, or who shall wilfully and corruptly be guilty of oppression, malfeasance or partiality in the discharge of his official duties, shall upon conviction thereof be fined in a sum not exceeding two hundred dollars. And the court shall have power upon the recommendation of the jury to add to the judgment of the court that any officer so convicted shall be removed from office. The court shall have power, whenever any clerk of the district court, attorney general or prosecuting attorney shall be presented or indicted, to appoint for that occasion a prosecuting attorney, attorney general or clerk, as the case may require, who shall thereby be invested in relation to such presentment or indictment with all the powers of clerk, or attorney general, or prosecuting attorney. It shall be the duty of the court when the judgment shall extend to removal from office, to cause immediate notice of such removal to be given to the proper department, in order that the vacancy thus occasioned may be filled."

The above sections are the only statutes I find under which either a district attorney or a sheriff may be removed from office.

My conclusion, therefore, is that the Governor has no power to remove a district attorney or a sheriff from office.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

167. INSURANCE

To Mr. T. C. Doolittle, March 22, 1925.

Chap. 164, S. L. 1925, prohibits the taking out of fire insurance on State buildings or contents; but there is nothing in the act that would prohibit the School of Mines from carrying fire insurance on Federal property in its custody.

168. COUNTY COURT

To Miss Carra M. Shackleford, Clerk of County Court, March 22, 1926.

Plaintiff's docket fee does not cover the costs of an appeal to the district court.

169. BLIND BENEFITS

To State Commission for the Blind, March 22, 1926.

Under Sec. 8, Chap. 60, S. L. 1925, the heirs, assigns, or legal representatives of a deceased blind beneficiary may collect the blind benefit accruing between the date covered by the last quarterly payment and the date of the death of the beneficiary, the amount paid to be computed pro rata.

170. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, March 25, 1926.

It is unlawful for a non-admitted foreign company to issue insurance policies by mail to residents of Colorado.

171. SCHOOLS

To M. L. Youmans, March 25, 1926.

A county superintendent of schools may fill a vacancy in school board but he has no power to declare a vacancy.

172. SCHOOLS

To M. L. Youman, March 25, 1926.

A teacher employed as a substitute or as a full time teacher is eligible to become a member of the school board but the acceptance of the office of school director automatically cancels the teacher's contract.

173. BLIND COMMISSION

To State Commission, March 26, 1926.

Investigator for Temporary Work

The commission has authority to employ a special investigator for temporary work at a salary of not to exceed $125 per month and necessary traveling expenses. Such employment should be consented to by the Civil Service Commission.

174 **BANKS AND BANKING**

To E. V. Dunklee, March 30, 1926.

The State Bank Commissioner has no authority to maintain actions to enforce stockholders' statutory liability except in cases where he has taken possession of assets of bank for purposes of liquidation.

175. **OIL INSPECTION FUNDS**

To Governor Morley, April 1, 1926.

1. The fund arising out of fees of the office of State Inspector of Oils may be paid out upon vouchers approved by the State Inspector and the Governor, without authorization of the State Auditing Board. Ch. 139, S. L. 1925.

2. Expenses for mapping and testing oil shale lands for the purpose of determining oil content and values would be expenses incurred in making "geological examinations" within the intent of the statute.

176. **SCHOOLS**

To H. T. Sukeforth, April 5, 1926.

A school district may not erect a school building with money in the special fund without first being authorized so to do by a vote of the electors of the district.

177. **FAIRS**

To H. A. Ireland, County Extension Agent, April 5, 1926.

If boards of county commissioners or boards of directors of county fair associations advertise premiums to be offered at fairs they are under obligation to pay them and this obligation may be enforced by an action of law.

178. **SCHOOLS**

To Alice Burnett, County Superintendent, April 6, 1926.

Insurance money received by a school district for the destruction of a school house by fire belongs to the entire district and a portion of the district which is to be transferred takes only its pro rata share based on the school census and that only after the current debts of the district are paid.

179. **BANKS AND BANKING**

To Homer F. Bedford, County Assessor, April 10, 1926.

The only assessment which the law provides upon the property of incorporated banks is to be made upon their real estate and upon their shares of capital stock. This rule applies even though the bank has become insolvent and is in the hands of the bank commissioner.

180. GARNISHMENT

To Chas. W. Taylor, County Attorney, April 12, 1926.

Counties are not subject to garnishment. See McPherson, State Bank Commissioner vs. Board of Commissioners of Prowers County, 241 Pac. 733.

181. TRUST COMPANIES

To State Bank Commissioner, April 14, 1926.

A trust company organized under the Incorporation Act of 1877, is not required by the acts of 1891 or of 1913 to have a capital of $250,000 in cities of the first class.

182. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, April 16, 1926.

Insurance against the confiscation of automobiles used to violate the law is void as contrary to public policy if written in favor of the owner of the car who is also the law breaker; but if written for others who have sold or financed the sale of the car the contract would probably be enforcible provided such parties had no knowledge that the car was being used to violate the law.

183. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, April 19, 1926.

Under the Colorado retaliatory law the commissioner should require a Georgia company seeking to do business in this State to make the same deposit which under the Georgia laws a Colorado company doing similar business in Georgia would have to make there.

184. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, April 19, 1926.

It is discretionary with the commissioner of insurance whether he shall accept a title guaranty policy or an abstract of title with an attorney's opinion when passing upon a loan made by an insurance company on real estate.

185. WESTERN STATE COLLEGE

To Mr. S. Quigley, April 21, 1926.

There is no state statute prohibiting the Western State College from using a motion picture machine for educational purposes.

186. COLORADO SCHOOL OF MINES

To M. F. Coolbaugh, April 26, 1926.

Members of the faculty of the School of Mines must be licensed as engineers before they can practice the profession of engineering in connection with their school duties.

187. GAME AND FISH

To George L. Winters, Sheriff, April 27, 1926.

Under the act of 1925 there is no open season on trout and grayling in lakes over 4500 feet and less than 7500 feet in altitude.

188. MOTOR VEHICLES

To Carl S. Milliken, April 29, 1926.

Certificate of Title

In the absence of an agreement with the purchaser of a motor vehicle for retaining in possession the certificate of title required under Ch. 136, S. L. 1925, the seller of such vehicle has no right to retain possession of such certificate.

189. NOTARIES PUBLIC

To Governor Morley, April 29, 1926.

A notary's commission issued to a married woman in her own name before marriage is legal and valid.

190. ENGINEER—STATE

To M. C. Hinderlider, May 4, 1926.

Statutes imposing liabilities or obligations are not binding upon the state or its political subdivisions, unless they are expressly named in the statute, hence, the State Engineer's office is not authorized to collect fees for filings made by the State or its counties or municipalities.

191. LEGAL PUBLICATIONS

To C. W. Fulghum, May 6, 1926.

When a weekly newspaper changes into a daily paper, the daily paper must be published for a period of six months before it is qualified to print legal notices and advertisements as the qualifications of the weekly paper do not carry over to the daily paper.

192. STATE PENITENTIARY

To Governor Morley, May 6, 1926.

The Governor of the State has no authority or power to order the allowance of "good time" to convicts in the penitentiary, or to trusties working outside, additional to that provided by statute.

193. SCHOOL LAW

To Mrs. Nellie E. Fee, May 7, 1926.

Formation of Districts

A county superintendent has no statutory power to annex an entire school district to a contiguous district without action by each district affected.

Procedure outlined in Secs. 8310 and 8315, C. L. 1921.

194. DETECTIVE AGENCIES

To Foster Cline, May 7, 1926.

Payment of License Fees

A detective agency which is listed and advertises to perform detective service should probably be required to pay the license fee provided by Sec. 4780, C. L. 1921, even though such agency claims to perform only a certain class of services.

195. LIVESTOCK—GRAZING

To Governor Morley, May 10, 1926.

There is no statute of this State that would prohibit nonresident owners of livestock from grazing the same upon the public domain of the United States in Colorado.

196. CITIES AND TOWNS

To Miss Doris Williams, Town Clerk, May 14, 1926.

Town authorities have no power to close a disorderly house located outside of the town limits.

197. MOTOR VEHICLES

To Webb D. Martin, May 14, 1926.

When a motor vehicle is transferred from one licensed dealer to another to be kept in his place of business for sale, no new certificate of title need be taken out by the purchasing dealer.

198. JUNIOR COLLEGE

To Mr. D. B. Wright, May 18, 1926.

The grantee in a deed conveying land to the Junior College at Grand Junction should be the "State of Colorado".

199. SCHOOLS

To W. E. Abell, May 19, 1926.

When a teacher resigns during the school term she should be paid her pro rata part of the annual salary including the portion of the summer salary that has been earned. There is no statute on this question.

200. WESTERN STATE COLLEGE

To Mr. E. G. Baker, County Superintendent, May 20, 1926.

A holder of a two-year diploma issued by the Western State College is not qualified to teach in a senior high school under the provisions of Chap. 165, S. L. 1923.

201. EIGHT-HOUR LAW

To M. H. Alexander, May 22, 1926.

The eight-hour provision of Sec. 4173, C. L. 1921, has no application to work in a railroad tunnel.

202. STATE HIGHWAYS

To Major Blauvelt, May 25, 1926.

The Highway Advisory Board has authority to order the removal of objectionable signs along the right of way of a state highway, and if the owner refuses to comply with said order, the Board may lawfully remove said signs. Also see Ch. 128, S. L. 1923.

203. SCHOOLS

To George B. Hoagland, May 27, 1926.

When at a school election a mob appeared and took possession of the ballot box when the election was but half finished, the election is not legally held and it is the duty of the board to call a special election.

204. OFFICERS

To Senator Alexander R. Young, June 1, 1926.

A state senator is not disqualified from bidding upon or accepting contracts for the construction or improvement of buildings of state institutions.

205. STATE ENGINEER

To M. C. Hinderlider, June 3, 1926.

Distribution of Water, District No. 12
Liability of El Paso County

Each county is liable for its pro rata share of Water Commissioner's salary, but Water Commissioner is not entitled to additional pay for distributing water other than for irrigation purposes.

206. CORPORATIONS—MINORS

To Carl S. Milliken, June 3, 1926.

A minor may be a stockholder in a corporation and may serve as a director thereof.

207. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, June 7, 1926.

The Commissioner of Insurance does not violate Sec. 2477 C. L. 1921, by accepting the premium due upon the conversion of a policy on his own life when the agreement for the payment of such commission was made before he took office.

208. MARKET DEPARTMENT

To E. F. McKune, June 8, 1926.

The Director of Markets cannot pay employes salary of $150.00 per month unless actual and substantial services are performed on Sundays.

209. HIGHWAY DEPARTMENT

To Governor Morley, June 9, 1926.

Under Sec. 1377 of the Workmens Compensation Act as amended by Sec. 2, Ch, 182, S. L. 1925, the State Highway Department is required to pay premiums to the State Compensation Insurance Fund for insurance upon its employes engaged in highway work.

210. SOLDIERS AND SAILORS HOME

To Charles Davis, Auditor, June 9, 1926.

Salary of Commandant

Where there was a provisional appointment to the position of Commandant, and thereafter an eligible list was created for said office, the provisional appointment automatically ceased; and the provisional appointee should not thereafter be paid a salary, unless ordered by the courts.

211. APPROPRIATIONS

To Commission for the Blind, June 9, 1926.

The appropriation made by Sec. 12, Ch. 60, S. L. 1925, for the use of the State Commission for the Blind, cannot be used for the purchase of ground for a new workshop for the blind, or for the construction of a new workshop thereon.

212. STATE PENITENTIARY

To Charles Davis, Auditor, June 9, 1926.

The position of superintendent of manufacture of license plates at the State penitentiary is in the classified civil service, and the salary of this position should not be paid without a certificate of the State Civil Service Commission that the appointment to the position was made pursuant to law.

213. COLORADO NATIONAL GUARD

To Charles Davis, Auditor, June 9, 1926.

Salary Vouchers.

Vouchers for the salary of the Adjutant General must be approved by the State Military Board.

214. AGRICULTURAL COLLEGE

To Dr. Lory, President, June 11, 1926.

There is no legal obligation on the part of the State Agricultural College to allow any accounts presented by the city health department for services to students during an epidemic.

215. SCHOOLS

To Mr. Wilson R. Brown, June 16, 1926.

Under Chap. 135, S. L. 1923, it is necessary that a contractor constructing a building for a school district to put up a bond signed by an incorporated surety company. A cash bond does not fulfill the requirements of the statute.

216. GASOLINE TAX

To Lieut. Hal C. Cranberry, June 22, 1926.

The state gasoline tax must be paid on gasoline sold to civilians by the Fort Logan post exchange.

217. SCHOOLS

To W. E. Baker, Superintendent of Schools, June 24, 1926.

1. A school board may without a vote of the people of the district build country schools in whatever part of the district they deem them necessary.

2. A school board may hire a man and car to transport children living more than one mile away to the schools provided that the person so employed gives a bond as required by Section 8317, C. L. 1921.

3. Instead of hiring a man and car, the Board, may, without a vote of the people, purchase and operate a bus for such transportation.

4. The Board has the power to close school buildings which it thinks unnecessary and distribute the pupils to other schools within the district.

5. The Board may, without an election, sell unused school buildings or the sites therof.

6. The Board may without an election buy buildings or lots for school purposes.

218. OFFICERS

To Martin Van Sopel, Town Clerk, July 3, 1926.

A person may legally be a member both of the town board and of the school board.

219. MOTOR VEHICLES

To Carl S. Milliken, Secretary of State, July 7, 1926.

In issuing a certificate of title for a motor vehicle a county clerk should use reasonable diligence in ascertaining whether or not there are any liens or encumbrances on the vehicle and should not stamp the certificate to show that it has not been checked for tax liens on the car.

220. CITIES AND TOWNS

To W. B. Bevard, City Marshal, July 7, 1926.

A defendant does not have the right to demand a jury trial in a police magistrate court.

221. GASOLINE TAX

To Mr. Lurtin R. Ginn, July 7, 1926.

Gasoline used in any vehicle belonging to the United States government is exempt from taxation but gasoline used in machines owned by contractors working for the United States government is not exempt.

222. MUNICIPAL WATER SUPPLY

To Dana E. Kepner, July 12, 1926.

Authority of State Board of Health.

When, upon request of town officials, the State Board of Health had made investigation of unwholesome conditions existing in the municipal water supply and recommended the procedure to eliminate such conditions, the Board has done everything that it is required or permitted to do under Ch. 145, S. L. 1925.

It is the duty of the citizens interested to insist that the conditions complained of be remedied.

223. ELECTIONS

To C. R. Furrow, July 12, 1926.

Voters at primary elections may receive assistance if illiterate or physically disabled from reading or writing, but voters at general elections can receive assistance only in case of absolute and total physical disability.

224. STATUTES

To John C. Young, District Attorney, July 16, 1926.

Section 26 of Article V, of the Colorado Constitution which requires that the fact of the signing of all bills by the presiding officers of the respective houses shall be entered on the journal is directory rather than mandatory.

225. GAME AND FISH

To R. G. Parvin, Game and Fish Commissioner, July 17, 1926.

The state game and fish department cannot acquire land by condemnation.

226. QUARANTINES

To George M. List, Fort Collins, July 22, 1926.

Horticulture.

In view of the decision of the U. S. Supreme Court in Oregon, Washington Ry. & Nav. Co. vs. Washington, 46 U. S. Sup. Ct. Reporter, 279 (Mar., 1926) our State Law (Sec. 3100 C. L. 1921) providing for interstate quarantines against plant diseases should be re-enacted.

227. BUILDING AND LOAN ASSOCIATIONS

Building and Loan associations should not be taxed on moneys loaned on taxable property.

Stock in such associations is not taxable in hands of stockholders.

To Clem W. Collins, July 23, 1926.

Dear Sir:

We have your favor of the 1st inst. in which you say:

"The Building and Loan Associations of Denver County are claiming exemption under special Statute and some are also advertising that their stock is exempt from taxation in the hands of stockholders. This would mean that investments in this class of companies would escape taxation entirely.

"Will you kindly inform this office as to the proper procedure in this case."

We have gone into this question extensively and have this to say:

The only statute we have dealing particularly with the taxation of building and loan associations is Sec. 7253, C. L. 1921, being Sec. 75 of the Revenue Act of 1902, which reads as follows:

"*Assessment of building and loan association.*

"Sec. 77. Building and loan associations, and mutual and co-operative associations, or corporations of like

character, shall be assessed as provided by this section, and shall be required to make return, to the assessor of the county where the principal office is located, of the following facts:

"First—The amount and value of its real estate, and where situated.

Second—The value of its furniture and fixtures, and where situated.

Third—The value of its other tangible personal property, and where situated.

Fourth—The total authorized capital stock.

Fifth—The amount issued and outstanding.

Sixth—The credited value of stock paid in as shown by the company's books.

Seventh—The amount of moneys, notes and credits.

Eighth—The amount of liabilities other than liabilities on stock.

Ninth—The amount of liability on stock.

The real estate and tangible property shall be assessed to the corporation or association at the place where such property is situated. From the moneys, notes and credits held there shall be deducted the liabilities to shareholders and all other liabilities, and such surplus over debts as the association may hold shall be assessed to such association or corporation at the place where its principal office is located."

In the concluding paragraph of this section we find: "The real estate and tangible personal property shall be assessed to the corporation or association at the place where such property is situated." This is plain enough to warrant the assertion that a building and loan association must pay taxes on its real estate and other tangible property, and there is no provision in the revenue law under which this can be avoided. The paragraph referred to proceeds as follows: "From the moneys, notes and credits held there shall be deducted the liabilities to shareholders and all other liabilities, and such surplus over debts as the association may hold shall be assessed to such association or corporation at the place where its principal office is located." From this we see that from such moneys, notes and credits shall be deducted all liabilities and the surplus over debts assessed to the corporation. This is equally plain but having in view the rule that statutes are to be construed as part of a uniform system, and such a scheme adopted as will give each part its appropriate place, and not destroy uniformity and harmony by cutting the system into disjointed and incongruous parts, we must give effect to another section of the Revenue Act of 1902, Sec. 14, being Section 7195 C. L. 1921, which contains the following:

"Provided, That where any property within this state is mortgaged, conveyed or pledged for the security of a loan or debt then owing, the said property and the notes, mortgage, deed of trust, trust deed, contract or other conveyance, shall be assessed as a unit, and as one and the same, and as of one value and as the value of said property so mortgaged, pledged or otherwise conveyed only, and any such notes, mortgages, deeds of trust, trust deeds,, contract or conveyance, shall not be otherwise returned or assessed."

There is nothing ambiguous in this proviso. It applies to all mortgaged property and to all notes secured in any form on property whether the notes so secured be held by individuals or by building and loan associations. It is of universal application, so we are of the opinion that in assesing a building and loan association, there should be deducted from its moneys, notes and credits not only its liabilities to shareholders and other liabilities, but also all sums secured by mortgage or otherwise on property that is taxed or is taxable, and with this additional deduction the true surplus liable to assessment and taxation is found.

This would necessarily mean that building and loan stock in the hands of stockholders is not assessable, for the reason that the withdrawal value of such stock in the hands of the association is invested and secured by mortgage or otherwise on property subject to taxation, or if not so invested it forms a part of the surplus upon which the association is required to pay taxes. If the stockholder made a loan secured by note and mortgage or trust deed on taxable property the note, or credit, would not be taxable, and if the stockholder, instead of making the loan himself, permits the building and loan association to make the loan as his agent with his money, the same rule must necessarily apply.

By reason of the above we are of the opinion that building and loan associations are not exempt from taxation by any statute, special or general; that such associations are taxable on their real estate and tangible personal property, and on the surplus of their moneys, notes and credits over and above their liabilities to stockholders and others, and less that part of such moneys, notes and credits secured by mortgage or otherwise on taxable property; and that the stock of such associations in the hands of stockholders is not subject to taxation. Any other conclusion would mean double taxation, and under this plan no property escapes taxation.

This opinion is fully sustained, we believe, by the case of *Board of County Commissioners of Washington County v. Murray,* 71 Colo. 522. In this case the assessor added to Murray's tax schedule certain mortgage loans held by the bank owned by Murray who paid the taxes under protest. He brought suit to recover and was successful in the lower court whose decision was affirmed by the Supreme Court which bases its decision on the proviso found in Sec. 7195, C. L. 1921, hereinabove quoted. The County Commis-

sioners urged that the failure to tax the mortgages was an exemption from taxation of property in violation of Sec. 6, Art 10, of the Constitution, but the court held, p. 525, that such omission was a deduction rather than an exemption. This case settles the present law herein although a decision somewhat different was arrived at in the *Board of County Commissioners of Arapahoe County v. The Fidelity Savings Association,* 31 Colo. 47, 52, the court saying:

> "It is our judgment that this association is liable for taxation upon the value of its loans, real estate, furniture and fixtures, cash on hand and in banks; and that from the aggregate value of its credits should be deducted the amount due the members as the withdrawal value of the stock.
>
> "The holders of the stock of the association should pay taxes on the withdrawal value of the stock; and it seems to us that the owners and the value thereof can be easily ascertained."

This decision was rendered in a case arising before the passage of the Revenue Act of 1902, and does not state the present law, and the statement that the holders of the stock of the association should pay taxes on the withdrawal value of the stock is a mere dictum as that question was not raised in the case.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By A. L. BEARDSLEY,
Assistant.

228. SECURITIES ACT

To Albert G. Craig, July 28, 1926.

A corporation selling first mortgage real estate notes in this state must file a prospectus under the securities act.

229. SCHOOLS

To Henry W. Catlin, County Attorney, Aug. 9, 1926.

A balance remaining in a special school fund may be used for building purposes or for the payment of school bonds and interest.

230. ELECTIONS

To Messrs. Goodale & Horn, Aug. 9, 1926.

In placing the name of a candidate upon an election ballot it is not necessary to use the Christian name in full but the initials of the Christian and middle name may be used.

231. COPYRIGHT

To R. W. Tallman, Aug. 9, 1926.

State Statutes and Reports

Excerpts from Colorado reports and statutes may be incorporated in a work on School Law without violating copyright law.

232. BUILDING AND LOAN ASSOCIATIONS

To Charles Davis, Auditor, Aug. 10, 1926.

By-laws imposing fines, penalties or forfeitures must be reasonable.

233. BUILDING AND LOAN ASSOCIATIONS

A Building and Loan Association incorporated in a state whose laws prohibit foreign associations from transacting business therein is prohibited from doing business in Colorado.

To Hon. Charles Davis, Auditor of State, Aug. 12, 1926.

Dear Sir:

We have yours of the 10th inst., submitting the application of the Intermountain Building & Loan Association of Arizona, for a certificate of authority to transact business in the State of Colorado, and we are advising you that you have not the authority to issue such certificate, for the reason that such association cannot, under our statutes, operate in this State.

Accompanying the application in this case are numerous exhibits among which we find "Exhibit I", a certified copy of Chapter 76, House Bill No. 162, Session Laws of Arizona, 1925, an act to provide for the organization of building and loan associations, prohibiting the doing of business by any company not qualified under the act, prescribing penalties for violation and repealing acts in conflict. Section 16 of said act reads as follows:

> "No foreign corporation or any corporation organized under the laws of any other state, shall be admitted or allowed to transact business of a building and loan association within this state or maintain an office in the state for the purpose of transacting such business. Provided nothing herein shall affect any contract heretofore made between any citizen of this state and any company organized under the law of any other state, which may be prohibited by this act from doing or continuing to do business in this State; and further provided that all funds so collected from such contract shall be invested in first mortgage loans on real estate situate in the State of Arizona or in bonds as provided by this act and that such company may issue in connection with loans made as aforesaid, an amount of stock in such association as equal to the amount of the loan made."

Section 17 provides penalties for violation of the act.

You will observe that Section 16, above quoted, absolutely prohibits a building and loan association organized in the State of Colorado from being admitted to the State of Arizona or allowed to do business therein, and no exceptions whatever are made.

To meet a situation of this kind, we find in the Compiled Laws of Colorado, 1921, the following section:

> "The statements required of foreign building and loan associations shall be renewed annually in January, in the manner as required by this act, and shall be made at such other times as the secretary of state may require. When, however, the laws of any other state, territory or nation, and under which such association may be incorporated, require any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions of any association that might be organized under the laws of this state and doing business in such other state, territory or nation, or imposes the same upon its agents doing business therein, then, so long as such laws continue in force, the same obligations and prohibitions of whatever kind, shall be imposed upon all such foreign building and loan associations of such state, territory or nation doing business in this state, and upon their agents here, to the extent that the same may be in excess of the requirements imposed upon such foreign associations by the provisions of this act."
>
> Sec. 2806, Compiled laws, 1921.

Under the provisions of this section, all you can do, in our opinion, is to reject the application, and you have no discretion whatever in the matter.

The object of our statute is clear; the design was to put building and loan associations coming from other states into the same position as ours would be in the state whence they came, and inasmuch as a Colorado building and loan association may not do business in Arizona, neither may an Arizona building and loan association do business in Colorado.

The right of a state to exclude foreign corporations is perfectly settled and not open to debate.

Paul v. Virginia, 75 U. S. (8 Wall.) 168; 19 L. Ed. 357.

Our opinion herein is fully supported by *Talbott, Appt. v. Fidelity & Casualty Co. of New York*. This was a case where a New York corporation applied for a renewal of its license to do business in the State of Maryland, and the Court of Appeals upheld the rejection of the application by reason of the Maryland statute which contains the same provisions found in the Colorado statute above quoted. 74 Md. 536, Atl. 395, 13 L. R. A. 584.

The Arizona company being barred from entry under our statute, its financial condition, plan of busines and other data submitted, are immaterial.

We are herewith returning the application and exhibits, with the recommendation that the application be rejected.

Yours very truly,

WILLIAM L. BOATRIGHT,
Attorney General.
By A. L. BEARDSLEY,
Assistant.

234. GOVERNOR

The Governor has no power to revoke a communtation of sentence that was granted without condition.

To Thomas J. Tynan, Warden State Penitentiary, Aug. 17, 1926.

Dear Sir:

In your letter of the 11th inst., you ask my opinion as to your duty as Warden under the following state of facts:

One Morgan Gavin was convicted in the District Court of Garfield county on two counts for violations of our statutes relating to intoxicating liquors. On the first count he was sentenced to a term of imprisonment of not less than three nor more than four years, and on the second count to a term of not less than two nor more than three years in the State Penitentiary, the sentences to run concurrently. Mittimus was issued January 25, 1926, and thereafter Gavin was duly received by you as an inmate of the penitentiary to serve the sentences above mentioned.

May 25, 1926, the Governor, for certain reasons therein set forth, duly signed and entered his Executive Order "that the sentences of the said Morgan Gavin, No. 13,407, be and the same are hereby commuted to a term that will permit his immediate release on parole."

The effect of said Executive Order was to render Gavin immediately eligible to parole under the indeterminate sentence statutes of this state (Sections 7156-7161, C. L. 1921), and thereupon Gavin was released on parole as provided by said statutes.

August 6, 1926, the Governor signed and entered his further Executive Order as follows:

> "WHEREAS, it has been represented to me that Morgan Gavin, No. 13407, who was sentenced December 31, 1925, to a term of 2 to 3 years and 3 to 4 years, concurrently, was entitled to commutation of his sentence, which commutation was granted on May 25, 1925, commuting the said sentence to a term of 3 months, 24 days to 4 years; and
>
> WHEREAS, it has since been called to the attention of the executive that he was misinformed of the facts in

the case and it is deemed proper that said commutation be revoked; It is therefore,

ORDERED: That the said commutation heretofore granted the said MORGAN GAVIN, No. 13407, be and the same is hereby revoked and held for naught, and the warden of the penitentiary is hereby directed to expunge said commutation from the record of the said MORGAN GAVIN, and return the said MORGAN GAVIN to the penitentiary to serve his original sentence, revoking his parole granted May 30, 1926.,

GIVEN under my hand and the Executive Seal this Sixth day of August, A. D. 1926."

The question you submit is whether or not it is now your duty as Warden to reincarcerate Gavin in the state penitentiary to serve his original sentences in like manner as though such sentences had never been commuted.

Our indeterminate sentence statutes above mentioned provide that when a convict is sentenced to the penitentiary, otherwise than for life, the Court imposing the sentence shall not fix a definite term of imprisonment, but shall establish a maximum and a minimum term for which said convict may be held in prison, and that the Governor shall have authority, under such rules and regulations as he may prescribe, to issue a parole or permit to go at large to any convict imprisoned in the penitentiary under such a sentence *and who shall have served the minimum term of his sentence.*

Section 7159, C. L. 1921, which is a part of said indeterminate sentence act, reads as follows:

"Every such convict, while on parole, shall remain in the legal custody and under the control of the commissioners of the penitentiary and shall at all times be subject to such rules and regulations as they may prescribe, and shall be subject at any time to be taken back within the enclosure of the penitentiary from which he was permitted to go at large for any reason which may be satisfactory to the commissioners *and at their sole discretion;* and, *upon the request of the commissioners,* the governor may order said paroled convict to be returned to the penitentiary. Full power to retake and return any such paroled convict to the penitentiary from which he was permitted to go at large, is hereby expressly conferred upon the governor, whose written order, when duly signed and attested by the seal of the state of Colorado, shall be a sufficient warrant authorizing all officers named therein to return to actual custody in the penitentiary from which he was permitted to go at large any paroled convict, and it is hereby made the duty of all officers to execute said order the same as in ordinary criminal process."

At this point it will be observed that Sec. 4824, R. S. 1908, which was in force when the indeterminate sentence statute was adopted, vested the control of the penitentiary in a board of commissioners. But Chapter 52, S. L. 1915, created the Colorado Board of Corrections and gave that new board full control of the penitentiary, thus in effect repealing said Sec. 4824. Said Chapter 52, S. L. 1915, was in turn repealed by Chapter 85, S. L. 1921, but this act of 1921 (Sec. 536, C. L. 1921) also expressly vested the full control and management of the penitentiary in the Colorado Board of Corrections. So it is clear that the powers vested by said Sec. 7159, C. L. 1921, in the commissioners of the penitentiary are now possessed by the Colorado Board of Corrections.

It will be noted that said Section 7159 expressly provides that convicts admitted to parole shall be subject to be taken back within the enclosure of the penitentiary for any reason that may be satisfactory to the commissioners (now the Colorado Board of Corrections) *and at their sole discretion.* Said section further provides that *upon the request of the commissioners* (now the Colorado Board of Corrections) the Governor may order a paroled convict to be returned to the penitentiary. The last sentence of said section provides that full power to retake and return any paroled convict to the penitentiary is expressly conferred upon the Governor, whose written order shall be sufficient warrant authorizing all officers named therein to return a paroled convict to actual custody in the penitentiary. The Governor is thus made, or recognized as, the executive agent through whom paroled convicts are returned to the penitentiary. But I am fully convinced, from a study of said section 7159, that the power to determine when a paroled convict shall be returned to actual custody in the penitentiary was intended by said section to be vested exclusively in the commissioners of the penitentiary whose functions are now performed by the Colorado Board of Corrections. This is apparent from the fact that the section provides that a paroled convict shall be subject to reincarceration in the penitentiary for any reason which shall be satisfactory to the commissioners and *at their sole discretion,* and that the Governor *upon request of the Commissioners* may order a paroled convict to be returned to the penitentiary.

The indeterminate sentence act, as already stated, provides that the convict shall be admitted to parole *only after he has served his minimum sentence.* The minimum sentence of Gavin was two years on one count and three years on the other. So he would not now be eligible to parole, except for the Governor's order commuting his minimum sentences. It follows that, if the order of the Governor issued on the 6th instant revoking or purporting to revoke the commutation is valid and effective, Gavin has thereby become ineligible to parole, because the effect of such order of revocation would be to restore the original minimum sentences of two and three years, respectively, to full force and effect, and said minimum sentences have not yet expired. And in that event Gavin should, of course, be re-arrested and reincarcerated in the peniten-

tiary until his minimum sentences, as originally fixed, shall have expired. But if on the contrary, the order revoking the commutation is ineffective then the commutation still stands, and Gavin remains eligible to parole; and the parole heretofore granted could not, in my opinion, under the statutes, be revoked except by the Colorado Board of Corrections; and it would follow that you have no authority to reincarcerate Gavin unless or until said board shall direct that he be returned to the penitentiary, or until the commutation above mentioned shall be in some manner effectively revoked or set aside.

The legal question, therefore, is whether or not the Governor's Executive Order of the 6th inst., purporting to revoke the order of commutation entered May 25, 1926, is valid and effective.

The courts of this country are unanimous in holding that a pardon, when once delivered and accepted, cannot be revoked by the authority that granted it. In speaking upon this point, the Supreme Court of Iowa in the recent case of *Rathbun v. Baumel,* 196 Ia. 1337; 191 N. W. 299; 30 A. L. R. 219, said:

> "The written instrument having been once executed and delivered cannot be revoked by the Governor after he discovers the fraud. All authorities so declare."

See also to the same effect:—*Ex parte Williams,* 129 N. C. 636, 22 L. R. A. 238; *Ex parte Alvarez vs. Florida,* 50 Fla. 24; *Ex parte Rice,* 72 Tex. Crim. Rep. 597; *Rosson vs. State,* 23 Tex. Ct. App. 289; *State vs. Nichols,* 26 Ark. 83; *Ex parte Powell,* 73 Ala. 523; *Ex parte Reno,* 66 Mo. 269.

It is equally well settled that a pardon procured by fraud or false representations may be *set aside* by the *courts* in an appropriate judicial proceeding. We quote from 24 Am. & Eng. Enc. of L. 2nd Ed., page 582:

> "Where it appears that a pardon was granted upon a mistake as to any material fact, or was obtained by fraud or false representations, the court will declare it to be invalid and inoperative to confer any rights upon its recipient."
>
> "Although in some of the authorities a pardon obtained by fraud is said to be void, yet the correct principle is that a pardon so obtained is void only when in a proceeding authorized by law, before a court having jurisdiction for the purpose, and with ample opportunity for the criminal to defend, such a pardon is judicially declared to be void; and that where a pardon is obtained by fraud or misrepresentation it is voidable only, and remains in full force and effect until impeached in some appropriate proceeding."
>
> "As to the manner of attacking a pardon upon the ground of fraud or mistake in issuing it, the authorities are not harmonious. Perhaps the better rule — at all

events, the rule of the best considered cases—is that in order to impeach a pardon for fraud or misrepresentation practiced in obtaining it, it is generally necessary, in the absence of statutory provisions to the contrary, to invoke the aid of the court in a direct proceeding, and that a pardon cannot be attacked on that ground in a collateral proceeding. In accordance with this principle, where no suggestion of fraud or mistake appears upon the face of the instrument, fraud constitutes no ground for attacking the pardon on habeas corpus. But where it appears from the terms of the instrument that the pardon was granted upon misinformation, its validity may be attacked on habeas corpus, and if its *prima facie* invalidity is not explained or rebutted by the prisoner, the pardon will be declared void."

"In a number of cases it appears to have been considered that the nature of the proceedings in which the question might be raised was immaterial, provided the issue was presented for the decision of the court. And it has been held that a pardon might be attacked for fraud in habeas corpus proceedings."

See also to the same effect: *Rathbun vs. Baumel, supra; Ex parte Rice, supra; Rosson vs. State, supra; Dominick vs. Bowdoin,* 44 Ga. 266; *Com vs. Halloway,* 44 Pa. St. 210; *State vs. McIntire,* 46 N. C. 3; *State vs. Leak,* 5 Ind. 359; 2 *Wharton's Crim. Proc.,* 10th Ed., Section 1469.

The authorities do not seem to be fully in accord as to the quantum of measure of proof of fraud or misrepresentation that must be adduced in order to nullify a pardon. Blackstone laid down the rule that "any suppression of truth or suggestion of falsehood in a charter of pardon will vitiate the whole, for the king was misinformed." And this rule was followed in the *McIntire* and *Leak* cases above cited, while the text-writer Wharton, above cited, states that "the proper course is to permit fraud to be set up to vacate a pardon only when it reaches the extent in which it would be admissible to vacate a judgment."

But, as already stated, there is no conflict of authority whatsoever upon the proposition that the executive power that grants a pardon cannot revoke it, even for fraud or misrepresentation; and that a pardon, when once delivered and accepted, *can be set aside only by the judgment of a court in an appropriate judicial proceeding wherein the person to whom the pardon was issued is given an opportunity to be heard.*

The same principle necessarily applies to a commutation of sentence, such as was granted in the instant case, because a commutation is a limited or qualified pardon. See *Ex Parte Wells,* 18 How. 307; *State, ex rel., vs. Rose,* 29 La. Ann. Rep. 759.

Another matter remains to be considered. Paragraph 7 of the "Parole Agreement" which, as I am informed, was executed by

the Governor and by yourself as warden and accepted by the prisoner, provides that:

> "He shall also be liable to be retaken and again confined within the enclosure of said Penitentiary for any violation of this agreement, or for any other reason that shall be satisfactory to the Governor and Warden, until he receives written notice from the Warden that his final release has been ordered."

Whether such a condition is valid and binding upon the prisoner in view of the provision of the statute which devolves upon the Board of Commissioners (now Colorado Board of Corrections) the "sole discretion" to determine when a convict shall be returned to the penitentiary is a question which need not now be discussed, for in any event this paragraph of the agreement expressly requires the assent of both the Governor and yourself as warden to the retaking of the prisoner and your letter to me indicates that you are strongly of the opinion that the prisoner ought not to be retaken and that you do not intend to consent thereto.

Summarizing the above, my conclusions are as follows:

1. The commutation having been duly issued by the Governor and accepted by the convict, it could be revoked, cancelled or set aside only by the judgment of a court of competent jurisdiction in an appropriate proceeding, and since the commutation has not been so set aside it still remains in full force and effect.

2. The commutation rendered the convict immediately subject to parole and the parole having been duly granted he could, under the statutes, be returned to the penitentiary only in the discretion or upon the request of the Colorado Board of Corrections, and said board, as I am informed, has not directed or requested that the convict be so returned.

3. It follows that you are not required to return this convict to the penitentiary until (1) a court of competent jurisdiction shall have set aside the commutation and thereby rendered the convict ineligible to parole, or (2) until the Colorado Board of Corrections shall direct or request that he be so returned.

Yours respectfully,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy.

235. RECALL

To Mr. Charles E. Collins, August 17, 1926.

County Commissioners are not subject to recall as the legislature has never passed an act making effective Section 4, Art. XXI of the Constitution.

236. HIGHWAY DEPARTMENT

To State Highway Department, August 19, 1926.

The state highway department is not liable for sheep killed in the collapse of a bridge.

237. ESCHEAT ESTATES

To Wm. D. MacGinnis, State Treasurer, August 19, 1926.

When the state treasurer accepts Liberty Bonds as part of an escheat estate, heirs who prove their claim to the escheat property are entitled to recover the interest on such bonds.

238. ELECTIONS

To Messrs. Pelton & Chutkow, Aug. 20, 1926.

Acceptance of Primary Designation

A telegram is a substantial compliance with the requirement in Sec. 7535, C. L. 1921, that a written acceptance be filed.

239. ELECTIONS

To Mr. W. E. Schultz, August 21, 1926.

Independent certificates of nomination should be executed after the primary election.

Only electors who have not voted at the primary election should sign independent certificates of nomination.

240. STATE EMPLOYEES—LIABILITY OF

To James Dalrymple, Inspector of Coal Mines, Aug. 23, 1926.

State employees driving state owned automobiles are liable for damages caused by their negligence in driving such cars; but the state is in no way legally responsible for such damage.

241. STATE TEACHERS COLLEGE

To Dr. George W. Frasier, Aug. 24, 1926.

The board of trustees of the State Teachers College has the power to adopt and enforce a resolution prohibiting peddlers and agents from soliciting business on the campus and in the buildings of such institution.

242. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, Aug. 24, 1926.

Section 2522, C. L. 1921, does not prohibit the deferring of dividends on life insurance policies for more than five years.

243. ELECTIONS

To Carl S. Milliken, Secretary of State, Aug. 24, 1926.

Under the authorities, an inmate of an asylum or a student attending school is not . . . prevented from becoming a voter in the place where the school or asylum is situated. . . . The right to vote is not gained by a mere residence at the place; . . . . but it must be shown by facts entirely distinct from such residence.

Merrill v. Shearston, 73 Colo. 230,

Kemp v. Hoevner, 77 Colo. 177.

244. ELECTIONS

To Frank Tafoya, County Clerk, Aug. 25, 1926.

A candidate at a primary election may withdraw if he does so in ample time before the primary and files with the county clerk a genuine written statement of his withdrawal.

245. GAME AND FISH

To Frank D. Allen, County Attorney, Aug. 26, 1926.

Under Sections 7907 and 1574, C. L. 1921, a deputy game warden is entitled to no mileage or witness fees for attendance at a trial for the violation of the game laws.

246. TAXATION

To Mr. R. A. Bowers, County Treasurer, Aug. 26, 1926.

When a taxpayer is delinquent in the payment of taxes assessed against various items of personal property, the holder of a chattel mortgage on part of such property is entitled to pay the taxes on the property so mortgaged without paying the taxes on the remainder and when such payment is offered by the mortgagee, the county treasurer must accept it.

247. COUNTIES

To J. H. Habenicht, County Commissioner, Aug. 28, 1926.

Under Section 8908, C. L. 1921, a county is liable for the reasonable value of hospital and medical services rendered a man who was injured in the county when beating his way on a freight train.

248. ELECTIONS

To D. H. Akerly, County Clerk, Sept. 2, 1926.

1. When designations made at a political assembly are not certified to the county clerk by the officers of the assembly the county clerk should not include such designations in his published list of designations.

2. A designation is not complete until an acceptance is filed.

3. Acceptances tendered to the county clerk after the expiration of the seven days provided for filing by Sec. 7535, C. L. 1921, should be received.

249. SCHOOLS

To Mr. B. Malcolm Erickson, Asst. District Attorney, Sept. 2, 1926

The "permanent tenure of office for teachers act", Chap. 215, S. L. 1921, applies only to districts of the first class having a population of 20,000 or more.

250. STATE TEACHERS COLLEGE

It was not intended by the statute establishing the State Teachers College at Greeley, that the Board of Trustees thereof should have power to issue income bonds to finish the building of dormitories.

To James H. Pershing, Sept. 2, 1926.

Dear Sir:

Your letter of the 30th ult., directing attention to the fact that, under date of July 12, your firm submitted to this office a memorandum and brief concerning the power of the State Teachers College to borrow money by issuing a certain form of income bonds, is at hand.

In your letter you suggest that if such a plan is to be carried out by the college it is important that a conclusion be reached by this office.

It is the fault of the writer that you were not kept more closely in touch with developments after the submission of your memorandum and brief.

The facts are that immediately after your memorandum and brief were submitted a member of this office was delegated to go over the matter carefully and prepare a statement of his conclusions after a study of your brief and independent investigation of his own. Pending the completion of that work, it occurred to the writer that there were two questions which the Attorney General, as counsel for the college, should consider: First, whether or not the board of trustees of the institution has lawful authority to issue income bonds for the purpose contemplated; second, whether or not it would be sound or wise policy for the board to issue such bonds, if it should be considered by this office that it had lawful authority so to do. And it was, of course, realized by us that this second question would assume a far more delicate aspect if it should appear that the authority of the board in this behalf were in any reasonable degree doubtful or debatable.

Some three weeks ago the Attorney General, personally, and the writer hereof conferred with Dr. Frasier, the President of the college, upon this second point, viz. the question of policy involved. It was pointed out to Dr. Frasier that the proposed plan was one that had never been resorted to by any of the educational institutions of this state. And that the issuance of a large amount

of bonds under such a plan, however sound it might be from a business standpoint, might arouse severe criticism upon the part of members of the General Assembly. We made this observation not, of course, as a matter of criticism of the General Assembly, but simply to point out the natural resentment that might be aroused by the fact that an institution always heretofore supported, and fairly liberally so, by the largesse of the General Assembly should embark upon a new scheme of financing without having first asked and obtained legislative authority therefor. We thereupon suggested to Dr. Frasier that, in our opinion, the wisest and most prudent course for the institution to pursue would be to seek and obtain the consent of the General Assembly thereto before undertaking to carry out this new plan of financing the needs of the institution.

Dr. Frasier at once heartily agreed with the above views, and the writer took it for granted, perhaps too hastily, that the Doctor would, without further suggestion on our part, lay the situation again before the board and advise the withdrawal of its request for the opinion of this office upon the legality of the proposed plan. We have not yet heard from the board, but from the fact that Dr. Frasier was so fully in accord with the views of this office upon the question of policy, we think there is no doubt that the board will accept a recommendation of Dr. Frasier that the proposed plan be postponed until legislative sanction may be had therefor.

We have carefully studied your brief and the authorities therein cited but, while its force is fully recognized, were not wholly convinced that it was intended by the General Assembly that the board of trustees of the college should have such powers in the financing of the needs of the institution as were proposed to be invoked in carrying out the new plan.

Section 2 of the statute establishing the school provides, as you point out, that the board of trustees shall have control of the school with power to "do all things thereto lawfully appertaining, in like manner as municipal corporations of this state." This phrase, as you have recognized, is ambiguous and confusing, and it is quite impossible to ascribe to it a definite legal meaning or effect. Moreover, this general language is followed by a very considerable enumeration, in subsequent sections of the act, of specific powers and duties of the board (Secs. 8168 to 8177, C. L. 1921); and it seems to us that the fact of this specific enumeration of particular powers goes far to rebut any inference or conclusion that by the use of the above quoted language it was intended to give the board the broad general powers of a municipal corporation.

But approaching more immediately the question as to whether this act confers power upon the board to issue income bonds, we direct attention to the following particulars:

(a) Section 5 (Sec. 8168, C. L. 1921) provides that the trustees shall have general supervision of the school "and the

control and direction of its funds and the appropriations therefor." It seems to us that the language here quoted giving the trustees *control and direction* of the funds of the school and the appropriations therefor, quite clearly implies that the funds of the school are to come, as it were, from some exterior source; and that the trustees were empowered only to *control* such funds after the same had come to the school in some manner other than through action of the trustees themselves. In other words, the natural meaning of the language quoted is that the function of the trustees is to *control* and *direct* the funds of the institution *after* they shall have been derived from some outside source, rather than to *create* or *raise* such funds *by action on their own behalf*. Otherwise stated, if it had been intended by the statute that the trustees should have power to *raise* funds for the school by plans of financing devised by them, the statute would have expressly said so and given them power not only to *control* and *direct* the funds of the institution but to *raise, create* and *establish* such funds.

(b) Again, it will be noted that Sec. 6 (Sec. 8169, C. L. 1921) devolves upon the board the power and duty "*as* means shall be *provided and placed at their disposal*" to provide suitable grounds and buildings, "either by donation, purchase or lease". Here also, as we think, it quite clearly appears that it was intended by the lawmakers that the *means* whereby grounds and buildings should be acquired for the school, were to be derived from outside sources, rather than raised by independent action by the trustees themselves.

(c) Finally, Section 15 (Sec. 8155, C. L. 1921) of the act reads as follows:

> "The funds and revenues for the establishment and maintenance of said Normal School, for the payment of its officers, teachers and employes, and for *all* purposes incident thereto or necessary for the proper founding continuance and successful conduct thereof, shall be *appropriated* and apportioned in such manner as the General Assembly shall by law provide."

This section likewise, we think, definitely indicates a legislative intent that the school should always be supported, maintained and developed by funds supplied from time to time by the General Assembly.

In conclusion, permit us to say that, with the utmost deference to your firm and to yourself as a legal authority of unusually high standing, and while fully recognizing the strong and persuasive argument set forth in your brief, we have been impelled to the conclusion that the question of the right of the board of trustees to issue income bonds as proposed is at least a fairly debatable one and we have, therefore; the more readily come to the determination that the most prudent course for the board

to adopt would be to postpone action until the General Assembly shall expressly authorize such a plan of financing.

We thank you cordially for the interest you have taken in this matter and again express our regret that the above conclusion was not communicated to you at an earlier date.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy Attorney General.

251. COUNTY BOUNDARIES

The boundary between Costilla and Huerfano Counties is determined by the amended Huerfano boundary statute of 1868.

To Mr. E. N. Ellithorp, County Attorney, Sept. 8, 1926.

Dear Sir:

I have your letter of August 28, enclosing copy of your letter of the same date to the State Engineer, in regard to the boundary line between Costilla and Huerfano Counties.

The opinion of this office holding that in case of a conflict between the boundaries of these two counties as laid down in the statutes, the line described in the amended Huerfano boundary statute of 1868 would govern, was prepared rather hastily because the State Engineer desired to proceed with the survey at once. Inasmuch as a decision in cases of conflicting boundaries always depends to a considerable extent on the facts and circumstances of each particular case, it is possible that when all of the facts are known regarding the various acts of the Colorado legislature pertaining to this boundary it may be necessary to alter our opinion.

As you know, the boundaries of these two counties were first fixed by the Territorial Statute of 1861. By the laws of 1864, page 68, a different set of boundaries was prescribed for Costilla County. In 1868, the Seventh Session of the Colorado Territorial Legislature was held. At this session there was re-enacted, as one act, all of the laws of a general and public nature which had been theretofore passed, and, in addition, a number of new statutes were passed. As stated in a note by E. T. Wells at the beginning of the volume known as the Revised Statutes of Colorado of 1868, the new statutes passed at this session were distinguished from the old of re-enacted laws by having the title and the enacting clause prefixed thereto. Chapter 20 of these Revised Statutes of 1868 purports to be an re-enactment of former laws. It consists of forty-four sections, all of them pertaining to county boundaries and county seats. Section 2 of this Chapter 20 prescribes the boundaries for Costilla County, but the boundaries given in this section do not correspond with the boundaries prescribed in the statute of 1861, or with the boundaries prescribed in the statute of 1864. So far as I can ascertain no boundaries had been pre-

scribed for Costilla County except those of 1861 and 1864. The county of Las Animas had been created in 1866 (L. 1866, page 49) by taking from Huerfano County all of the territory which lay south of latitude 37½°; and by another act in 1868 the boundaries of Fremont County were changed (L. '66, page 49). By the laws of 1867, page 54, Saguache County was created out of Costilla County. After all of these changes, it is impossible for me to determine what were the correct boundaries of what was left of Costilla County in 1868, but it would seem that there should have been passed a new act giving the boundaries of what then remained of Costilla County. It seems probable that someone formulated a set of boundaries for Costilla County as it then existed and inserted it in this so-called re-enacted section when, as a matter of fact, there should have been a new act passed amending the Costilla County boundaries. I think it likely, however, that all of this does not affect the present question because it seems probable that the Costilla County boundary so far as it touches Huerfano County was not affected by any of these changes. I have dwelt upon this condition of the statute merely because I have been puzzled to know the origin of this Section 2 of Chapter 20.

Section 8 of Chapter 20 of the Revised Statutes of 1868, which, as I have said was an re-enactment of former law, also contained the 1861 boundaries of Huerfano County. Immediately following this Chapter 20 is a new act consisting of one section amending the laws of 1861 with reference to county boundaries and county seats, and then comes a new act entitled "An Act to Change the Boundaries of the Counties of Pueblo, Huerfano and Las Animas (Approved January 9, 1868)" which gives the Huerfano County boundaries as they are now found in the Compiled Laws of 1921.

The facts in the case of *Link vs. Jones*, 15 Colo. App. 281, which you cite were entirely different from the facts, so far as we know them, regarding the boundary between Costilla and Huerfano Counties. In the Link-Jones case the legislature had first described the western boundary of Jefferson County as running south from a certain point to the Platte River. When the legislature came to fix the boundaries of Park County, they started at a point on the Platte River which was *below* the point where the western Jefferson County boundary, as described, actually intersected the Platte River; that is, to the northeast of where the western boundary of Jefferson County struck the Platte River. From this point they proceeded south, west, north, and then east to an intersection with the aforesaid western boundary Jefferson County. They then described the eastern boundary of Park County as following the western boundary of Jefferson County to the Platte River and thence *up* the Platte River to the place of beginning. There seems to be no doubt that the legislature did not know the correct location of the Platte River and supposed that this western boundary of Jefferson County would strike the Platte River at a point *below* the point of beginning for the Park County boundary. In fact, it did not.

All that the Link-Jones case decides is that the court will

correct an obvious mistake of the legislature. There was no necessity to invoke the principle governing grants and patents referred to on page 288 of the decision, and it is to be noticed that Judge Bissell who wrote the opinion does not lean very heavily upon this principle and he cites no authority for its application in the determination of county boundaries. He seems to be in some doubt himself about its application because he uses the expression "if this rule be correct". As a matter of fact we think the learned judge erred in this particular part of his reasoning, although we fully agree with his decision of the case; in fact, no other decision was possible. The contention of Park County was that the western boundary of Jefferson County, described as running south from a certain point, must be swung far enough to the east to make it strike the Platte River below the point of beginning of the Park County boundary, in order that the last course in the Park County boundary might be made to go *up* the Platte River to the point of beginning as given in the statute. The trouble with this contention was in determining *how far* below this point of beginning the Jefferson County western boundary should be made to strike the Platte River; should it be one foot, or one mile, or ten miles. To put it below the point of beginning of the Park County boundary the court would have had to make it run almost due southeast from its northern beginning; and furthermore, would have had to select the point where it should strike the Platte River.

In my view, that part of the opinion in the Link-Jones case which applies the principle pertaining to patents and grants is entirely erroneous for the simple reason that counties do not become the owners of the territory within their borders as does a grantee in a patent or grant and therefore have no vested rights in such territory. For this reason, and perhaps others, the principle seems to have been thoroughly established that a legislature has plenary power over counties unless restricted by organic law.

15 C. J. 393, Section 4; 396, Section 9.

The organic act under which Colorado Territory was set up contained no limitation of the power of the legislature over counties.

The following is quoted from Section 92 of 1 *Dillon* on *Municipal Corporations,* 5th ed.:

> "*Public, including municipal corporations* are called into being at the pleasure of the State, and while the State may, and in the case of municipal corporations usually does, it need not, obtain the consent of the people to the locality to be affected. The *charter or incorporating act* of a municipal corporation *is in no sense a contract between the State and the corporation*, although, as we shall presently see, vested rights in favor of third persons, if not indeed in favor of the corporation or rather the community which is incorporated, may arise under it. Public corporations within the meaning of this rule are such as are

established for public purposes exclusively—that is, for purposes connected with the administration of civil or of local government—and corporations are public only when, in the language of Chief Justice Marshall, '*the whole interests* and franchises are the exclusive property and domain of the government itself,' such as *quasi* corporations (so called), counties and towns or cities upon which are conferred the powers of local administration. Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent: it may, where there is no constitutional inhibition, erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require.''

To this portion of the section is appended an extended note citing many cases from which we quote two paragraphs:

'' 'Municipal corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed.' '' *Per Harlan,* J., in Atkin v. Kansas, 191, U. S. 207, 220.

'' '*A municipal corporation,* in which is vested some portion of the administration of the government, may be changed at the will of the legislature. Such is a public corporation, used for public purposes'.'' *Per McLean,* J., in State Bank v. Knoop, 16 How. (U. S.) 369, 380.

'' 'Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them *are not vested rights as against the State,* but, being wholly political, exist only during the will of the general legislature; otherwise, there would be numberless petty governments existing within the State and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the legislature, either by a general law operating upon the whole State, or by a special act, altering the powers of the corporation.' '' Sloane v. State (implied modification of charter

as to vending liquor by subsequent general law) 8 Blackf. (Ind.) 361, *per Smith*, J., approving People v. Morris, 13 Wend. 325; Armstrong v. Comm. (as to removal of county seat), 4 Blackf. (Ind.) 208; *post*, Sections 105, 352.

It has been impossible for me to plot on paper the boundaries given in the different statutes for these two counties, for the reason that I am not familiar with the monuments named in the statute. It may be that when all of these various statutes are sifted down a situation will develop which would require modification of my opinion, but so far as I am in possession of the facts at this time I still believe that the Huerfano amended boundary statute of 1868 will govern in case there should be a conflict between its description of the common boundary and the description of that boundary in the "re-enacted" section of 1868 prescribing the Costilla County boundaries. I may add that the legislature of 1868 specifically repealed the Costilla County boundary statutes of 1861 and 1864. (R. S. '68, pp. 686, 689.)

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

By OLIVER DEAN,
Assistant Attorney General.

252. ELECTIONS

To Mr. O. D. Miller, September 9, 1926.

The county clerk should not put on the primary ballot the names of persons designated by political assemblies for the office of committeeman or committeewoman unless such persons have filed their written acceptances of such designation.

A party committee has no power to fill a vacancy upon the primary ballot.

253. CITIES AND TOWNS

To Mr. Herschel Horn, City Attorney, Sept. 9, 1926.

The Colorado Workmen's Compensation Act makes it compulsory for a city to carry workmen's compensation insurance.

254. ELECTIONS

To Mr. Rex C. Evans, County Clerk, Sept. 11, 1926.

Under Section 7542, C. L. 1921, it is impossible for a candidate designated by the Republican party to secure the Democratic nomination for the same office at a primary election by having his name written in on the Democratic ticket.

255. ELECTIONS

To Mr. Joe Liesen, Sept. 17, 1926.

At primary elections where a voter writes in a name on a primary ballot, his vote should be counted for the person whose name is so written in, even though the voter did not place a cross opposite such name.

256. INDUSTRIAL BANKS

To Clem W. Collins, Sept. 18, 1926.

Industrial Banks should be assessed and taxed as are other state banks.

257. ELECTIONS

To J. F. Lunsford, Sept. 21, 1926.

Publication of the notice of election should be made in one Republican and one Democratic paper in the county. Where there is one Republican and two independent papers, the notice should be published in the Republican paper and the independent paper having the greater circulation.

258. ELECTIONS

To Mr. W. C. Alexander, Sept. 27, 1926.

The canvass of an election must be based upon the face of the returns and the board of canvassers cannot go behind the returns certified by the judges and clerks of election and inquire into the question of whether or not a name has properly been placed upon the ballot.

259. INSURANCE

To Jackson Cochrane, Commissioner of Insurance, Sept. 27, 1926.

A school board can carry fire insurance on a school building in a mutual fire insurance company organized under Section 2547, C. L. 1921.

260. ELECTIONS

To Mr. Hugh J. Harrison, County Clerk, Sept. 27, 1926.

The wife of a naturalized citizen is a qualified elector provided that her husband was naturalized before Sept. 22, 1926. Prior to that date any woman who married an American citizen or any woman whose husband was naturalized became an American citizen by reason of that fact. However, under an Act of Congress, approved Sept. 22, 1922, an alien woman does not become an American citizen by marrying an American or by the naturalization of her husband but she must be naturalized in her own right.

261. **TAXATION**

To Major Fred Schoder, Sept. 29, 1926.

The State Military Department is exempt from the payment of special improvement taxes on armories when such taxes became a lien after the property was acquired by the State but is not exempt when the taxes became a lien before the State acquired the property.

262. **ELECTIONS**

To Mr. C. R. Furrow, County Clerk, Sept. 30, 1926.

Only those who have not voted at the primary election should sign a certificate of nomination of an independent candidate.

263. **INSURANCE**

To Jackson Cochrane, Commissioner of Insurance, Sept. 30, 1926.

The practice of merchants in offering gift insurance policies to customers is not unlawful.

264. **ELECTIONS**

To Mr. Robert Swinney, County Assessor, Sept. 30, 1926.

A county clerk may disregard the report of the canvassing board when he officially knows that such board has reported the nomination of a man at a primary election wrongfully.

265. **SCHOOLS**

To Royal W. Calkins, Oct. 4, 1926.

When pupils living in one district attend school in another, payment of the tuition must be agreed upon between the two districts, and the district in which the pupils attend school cannot be forced to accept them until the amount of tuition is agreed upon.

266. **CONVEYANCES**

To State Highway Department, Oct. 6, 1926.

Neither the governor nor the register of the Land Board has power to convey portions of the right of way of the Colorado Midland Railroad Company which have heretofore been deeded to the State.

Section 1149, C. L. 1921, applies only to the sale and conveyance of school lands.

267. **ELECTIONS**

To Miss Lillian Hardcastle, Oct. 13, 1926.

In cities of more than 2,000 and less than 5,000 inhabitants the Registration Committee should meet on the third Tuesday

preceding the day of the election and remain in continuous session for not less than three or more than five days. See Section 7612, C. L. 1921.

268. COUNTY FUNDS

A county treasurer is authorized and required to accept farm loan bonds issued by Federal land banks or joint stock land banks as security for deposits of county funds.

To Mr. George O. Twombly, Oct. 15, 1926.

Dear Mr. Twombly:

Your letter of the 12th inst., is at hand.

I thank you for your suggestions with reference to the effect of Chapters 72, 92 and 73 Session Laws of 1925. My view of this matter is that Chapter 73 had the effect of repealing all of Chapter 72 and that said Chapter 73 did not have the effect of merely adding a further proviso to Chapter 72. If these two chapters had been enacted as independent legislation, then they would supplement each other and would have to be read and considered together, with the substantial result that Chapter 73 would merely add a further proviso to Chapter 72; but that is not the situation. On the contrary, each of these chapters is in the form of an amendment to a former statute. Each of them, in fact, expressly amends Section 8796, C. L. 1921. Chapter 72 provides that said Section 8796 "is hereby amended to read as follows", and Chapter 73 also provides that said Section 8796 "is hereby amended to read as follows". Now, obviously, the same section of the compiled laws was not intended by the legislature to read in two different ways. Therefore, these chapters are utterly inconsistent with each other.

The courts have held that where a statute amends a former statute "so as to read as follows", it operates as a repeal by implication of inconsistent provisions in the former law, and of provisions therein omitted in the latter. See *Matter of Estate of Prime,* 136 N. Y. 347.

The case of *Ratcliff v. People,* 22 Colo. 75, is to the same effect.

It follows, in my opinion, that Chapter 92 is the only one that authorizes and requires county treasurers to accept securities in the place of depository bonds as a guarantee of the repayment of public funds deposited in banks. And said Chapter 92 limits the securities that the treasurer is authorized to accept to farm loan bonds issued by Federal land banks or joint stock land banks organized under the Act of Congress of 1916.

If you still entertain any doubt as to the legal effect of these three chapters, I shall be glad to discuss the matter with

you further, and, of course, you are always at liberty to take up with this office any matter effecting your official duties as county attorney.

With kindest personal regards, I am,

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy.

269. ELECTIONS

To Mr. Thana B. Epperson, Oct. 16, 1926.

No watcher may be present at the counting of absentee votes.

A county clerk has no power to send out a registration certificate unless he knows that the party named is duly registered.

There is no law requiring a list of the registration certificates sent out to be kept and therefore such a list is not a public record and as such subject to inspection.

270. ELECTIONS

To John L. Stivers, Oct. 16, 1926.

No assistance may be rendered to a voter at a general election who is illiterate or who cannot speak or read the English language.

271. ELECTIONS

To Joseph W. Hawley, Oct. 19, 1926.

The county clerk should place on the ballot the names of candidates for State representatives who are nominated by petition filed less than 30 days before election.

272. ELECTIONS

To Carl S. Milliken, Secretary of State, Oct. 20, 1926.

The secretary of state should accept withdrawals from nomination up to midnight of the tenth day before election and nominations to fill vacancies up to midnight of the eighth day before election.

273. TAXATION

To Colorado Tax Commission, Oct. 22, 1926.

Equities in State Lands

1. A county treasurer has the right to sell for delinquent taxes the equities of purchasers of State lands.

2. The county is not bound to refund taxes already paid on such equities after reversion to the State.

3. It is not incumbent upon the treasurer to refund the amount paid to the county by the holder of a tax certificate, after land reverts to the State.

4. Sec. 1179, C. L. 1921, makes it the duty of the treasurer to rebate taxes charged against State land after reversion to the State, but he has no authority to refund taxes already paid.

274. ELECTIONS

To J. H. Habenicht, County Commissioner, Oct. 26, 1926.

There is no provision in the Colorado election laws under which those confined to hospitals can vote.

275. MILITARY DEPARTMENT

To Col. A. L. Hart, Oct. 28, 1926.

The State Military Department is not liable to a county sheriff for the care and custody of court martialed prisoners confined in the county jail.

276. HIGHWAY DEPARTMENT

To Major L. D. Blauvelt, Oct. 28, 1926.

The highway department is not liable for damages caused by the failure of a culvert to carry off flood waters.

277. COLORADO

To Mr. Wm. Cahalan, Oct. 29, 1926.

There is no lawful abbreviation for the word "Colorado" but the one most commonly used is "Colo."

278. ELECTIONS

To Charles M. White, Oct. 30, 1926.

A voter who moves his residence two days before an election cannot vote in either the precinct he moves from or in the precinct he moves to.

279. SCHOOL LANDS

Re: Controversy with the Victor-American Fuel Company and The Colorado Fuel and Iron Company over royalties payable on certain leases of State school lands.

To The State Board of Land Commissioners, Nov. 1, 1926.

Gentlemen:

The facts in the above controversy are substantially as follows:

Statement of Facts.

Under date of June 30, 1917, your board by separate written instruments leased Sec. 16, T. 31 S., R. 65 W. and Sec. 36, T.

27 S., R. 67 W. to The Victor-American Fuel Company for coal mining purposes.

Each lease contains, *inter alia,* the following provisions:

1. That it should "continue in force for the full term of ten (10) years, unless all the available and merchantable coal that can be profitably mined from said premises shall have been taken out and exhausted prior to the termination of said ten (10) years, in which event this lease shall terminate." (Par 2.)

2. That the lessee shall pay a minimum monthly royalty of a stated amount for which it shall have the right to remove a maximum stated tonnage of coal per month without payment of any further royalty, and that for any excess tonnage in any calendar month, the lessee shall pay "the *stautory royalty* of ten (10) cents for each and every ton of mine run coal so mined." All royalty for each calendar month is made payable "on or before the twenty-fifth day of the following month". (Par. 4-5.)

3. That "on or before the twenty-fifth day of each and every month during the term of this lease, the Fuel Company shall make a sworn statement to the register of the State Board of Land Commissioners, disclosing the *exact* amount *in weight* of all coal mined from said premises during the preceding calendar month, and clearly setting forth the tonnage as shown by the miners' payroll check numbers, and shall also, during the term of this lease, on or before January 25th, in each year, make a sworn statement to the register of the State Board of Land Commissioners, disclosing the amount in cubic feet of all coal mined from the premises during the proceding twelve (12) months' period." (Par. 7.)

4. That "The State Board of Land Commissioners, at the end of the first five-year period of this lease, namely: June 30, 1922, *reserves the right of readjusting the amount of royalty* to be paid by the lessee. Provided, however, should such readjustment of the amount of royalty to be paid be unsatisfactory to the Fuel Company, this lease may be terminated by the Fuel Company upon giving written notice to the State Board of Land Commissioners of said termination." (Par. 20.)

Under date of October 2, 1917, your board also entered into two certain coal mining leases with The Colorado Fuel and Iron Company as lessee. These leases cover, respectively, the SW¼ of Sec. 36, T. 19 S., R. 70 W., and Sec. 36, T. 31 S., R. 65 W.

Each of these leases, likewise, contains provisions in language similar to that above quoted to the effect that: (a) the same shall continue in force for ten years unless the available and merchantable coal shall be exhausted prior to termination of such period; (b) that the minimum royalty shall be $100 per month, for which the lessee shall have the right to remove a maximum of 1,000 tons of coal per month without the payment of any further royalty, and that for excess tonnage the lessee shall pay "the statutory royalty" of ten cents per ton of mine run coal for such excess, and that all royalty for each calendar month shall be payable on or before the 25th day of the following month; (c) that on or

before the 25th day of each month the lessee shall furnish to the register of your board a sworn statement of the *exact* amount *in weight* of all coal mined during the preceding calendar month, and shall also furnish on or before January 25th of each year a sworn statement of the amount *in cubic feet* of all coal mined during the preceding twelve months; (d) and, finally, that your board reserves the right at the end of the first five-year period of "readjusting the amount of royalty to be paid by the lessee" provided that the lessee may terminate the lease if such readjustment should prove unsatisfactory to it. (See pars. 2, 3, 4, 7 and 20 of said leases.)

With reference to the Victor-American leases, I am advised that July 20, 1922, your board verbally directed its mineral superintendent to prepare formal orders to be entered on your records respecting each of said leases to the effect that, pursuant to the right reserved to it by paragraph 20 of said leases, and in accordance with Senate Bill No. 139 passed by the Twenty-third General Assembly and approved April 7, 1921 (Sec. 1185, C. L. 1921), your board would require payment of royalty at the rate of 15 cents per ton for all coal mined on and after June 30, 1922; and on the same day said superintendent prepared, and the register of your board signed and mailed to the lessee letters setting forth paragraph 20 of said respective leases, and directing attention to said act of 1921, and notifying the lessee that your board would require payment of royalty at the rate of 15 cents per ton on all coal mined on and after June 30, 1922. And September 27, 1922, the superintendent, by direction of your board, prepared and the register signed and mailed to the lessee letters referring to each of its said respective leases, and again directing attention to paragraph 20 thereof and to said act of 1921, and stating in substance that the board had acted under the "readjustment provision" of said leases, in accordance with said act of 1921, and would require payment of royalty at the rate of 15 cents per ton on all coal mined on and after June 30, 1922. Each of said letters concludes as follows: "Pursuant to the requirement as above set forth, I am herewith enclosing to you a copy of the proceedings of the State Board of Land Commissioners under date of July 20, 1922." And there was inclosed in each of said letters a copy of an order of your board under date of July 20, 1922, with reference to each of said leases.

Said orders, respectively, recite paragraph 20 of said leases, and refer to the requirements of the act of 1921 in regard to the "minimum price" of 15 cents per ton that must be paid the State by any person or corporation leasing coal lands, and provide that the lessee shall pay 15 cents per ton mine run on all coal removed on and after June 30, 1922, and further, that the minimum royalty shall be $200 per month in the lease on said Sec. 16, and $100 per month in the lease on said Sec. 36.

And with reference to each Colorado Fuel and Iron Company lease above mentioned, I am advised that the records of your board

show that under date of October 2, 1922, your board entered its formal order, of similar tenor to the above, and that under the same date letters, of similar tenor to those of September 27, 1922, above described, were prepared to be signed by the register of your board purporting to transmit to said lessee copies of said respective orders. It is claimed by this lessee, however, that said letters and copies of orders were not in fact received by it until January 10, 1923.

The matters in controversy are as follows:

1. Your board contends that the royalties reserved in these leases, at whatever rate fixed, are to be based upon a ton of 2,000 pounds of mine run coal, while the respective lessees insist that the tonnage, for the purpose of ascertaining the amount of royalty payable, is to be computed upon the basis of 27 cubic feet of coal per ton, measured in the solid.

2. Your board contends that the State is entitled to royalties at the rate of 15 cents per ton upon all coal mined on or after June 30, 1922, under The Victor-American leases, and on or after October 2, 1922, under the Colorado Fuel and Iron Company leases, while the respective lessees insist that the royalties payable by them during such periods of time remain at the original rate of 10 cents per ton.

We shall examine these questions in the order stated.

How Must Tonnage be Computed

Sec. 53 of the Act of 1905 "Relating to the State Board of Land Commissioners," etc. (Ch. 134, S. L. 1905), provided that:

> "Any * * * corporation leasing * * * coal lands * * * shall pay a minimum price of not less than ten cents (10) for each and every ton of coal mined * * *. The term ton, as herein used, means twenty-seven (27) cubic feet of coal measured in the solid, and shall be ascertained by the measurements of the space from which the coal is mined, deducting therefrom all space occupied by slate or other impurities. Such measurements shall be made monthly by the superintendent of the mineral department, according to the provisions of this act."

The act of 1905 was, however, expressly repealed by Sec. 35 of Ch. 134, S. L. 1917. This act of 1917 was approved April 19, 1917. It contained the usual emergency clause but not the so-called "safety clause", and so went into effect at the expiration of ninety days from the final adjournment of the General Assembly (In re Interrogatories of the Governor, 66 Colo. 319). The session of the General Assembly at which this act was passed adjourned *sine die* March 24, 1917 (House Journal p. 1459; Senate Journal p. 1281). The act of 1917 was therefore in effect at the time these leases were executed. Sec. 32 of this act of 1917 is a re-enactment of Sec. 53 of the act of 1905, but with the addition of the following *proviso:*

> *"Provided, however,* That when possible and when the State Board of Land Commissioners shall so order, the coal tonnage may be determined by the coal miners' payroll check numbers or railroad shipments, and such miners' check numbers and coal tonnage determined by weight at the mine tipple, shall be clearly set forth and enumerated in the required monthly sworn royalty statements." (S. L. 1917, p. 503.)

As above noted, all royalties recovered by these several leases are made payable on or before the 25th day of each calendar month for the preceding month, and paragraph 7, above quoted, of each lease provides that the lessee shall, on or before the 25th day of each month, make a sworn statement to the register of the *exact amount in weight* of all coal mined the preceding calendar month and clearly setting forth the tonnage as shown "by the coal miners' payroll check numbers," and shall also on or before January 25th in each year, make a sworn statement to the register disclosing the amount in cubic feet of coal mined from the premises during the preceding twelve months' period.

The fact that all royalties accruing under these leases are made payable on or before the 25th day of each month for the preceding calendar month, and that the leases require a statement on or before the 25th day of each month of the *exact* amount *in weight* of all coal mined during the preceding calendar month, while they require only an *annual* statement of the number of cubic feet of coal mined, in our opinion indicates quite clearly that it was intended that the royalties should be paid upon the basis of weight rather than of measurement. This conclusion is fortified by the following additional considerations:

(a) This *proviso* of 1917 recites that, when your board shall so order, the coal tonnage may be determined by the coal *"miners' payroll check numbers"* which is precisely the language used in paragraph 7 of these leases, which provides for the monthly reports of tonnage, thus showing that this proviso allowing a new method of computing royalties was definitely in mind when these leases were drafted.

(b) The royalty provisions are based upon "mine run" tonnage, and "mine run" means the entire unscreened output of a mine, not coal in the solid within the mine.

(c) During all of the five-year period of these leases, ending June 30, 1922, and October 2, 1922, respectively, the lessee made without protest, regular monthly settlements with your board upon the basis of tonnage as determined by weight, and not by measurement, and never demanded any readjustment on the basis of tonnage by measurement in cubic feet, thus showing that such was the construction of the contracts, by the parties themselves, from the time they were executed. Where a contract is in any degree ambiguous in its terms it is always proper to inquire what construction the parties put upon it in its performance up

to the time the dispute arose (Ditch Co. v. Kramer, 57 Colo. 223; Candeleria v. Columbian Co., 60 Colo., 340; Animas Co. v. Smallwood, 22 C. A. 476).

(d) It appears from the records of your board that these respective lessees held former leases upon the same lands that are covered by the leases now in controversy; and it is proper to consider these former transactions for the purpose of ascertaining the real intent of the parties in entering into the present leases (Ditch Co. v. Kramer, *supra;* 22 Corpus Juris, p. 1183; Putnam-Hooker Co. v. Hewins, 204 Mass. 426). Under date of July 1, 1912, your board granted The Victor-American Fuel Company leases upon each of the sections covered by the leases above described. These leases were for the period of five years from their date, and therefore had just expired when the present leases were executed. At the time these 1912 leases were granted the act of 1905, defining a ton of coal as meaning "27 cubic feet of coal, measured in the solid", was in force, and these leases provided for a minimum monthly royalty of $200, for which the lessee should have the right, without payment of any additional royalty, to mine monthly 2,000 tons of coal "*measured in the solid*, exclusive of all slate and other impurities, as provided by statute". A subsequent paragraph provided for payment of the "statutory royalty of ten (10) cents" for excess tonnage. But in the leases of 1917 now in controversy, which were executed after the *proviso* empowering your board to provide for the computation of tonnage upon the basis of *weight* at the mine tipple had gone into effect, the words "measured in the solid", etc., as above quoted, were omitted, and the words "mine run tonnage" substituted in lieu thereof. This change in language, we think, clearly demonstrates that it was intended, in The Victor-American leases of 1917, to adopt the new method of determination of tonnage that had just been expressly authorized by the *proviso* above quoted.

A somewhat similar situation is found to exist with reference to the Colorado Fuel and Iron Company leases. Your records show that June 12, 1907, a coal mining lease covering Sec. 36, T. 31 S., R. 65 W. was issued to this company. That lease by its terms expired October 2, 1917, the date of execution of the present lease of the same acreage to this company. It also appears from your records that under date of September 2, 1903, your board issued a coal mining lease covering the SW¼, Sec. 36, T. 19 S., R. 70 W. to one Arthur I. Kline for the period of ten years beginning January 12, 1903. This lease was afterwards assigned to the Colorado Fuel and Iron Company, and your records show that it was extended and continued in effect until October 2, 1917, the date of execution of the present lease of the same lands to the same company. Each of these leases of 1903 and 1907 respectively, is drawn upon a printed form containing the following clause:

> "The term *ton* as herein used *means a ton of two thousand pounds of unscreened coal* unless said party of the first part, The State Board of Land Commissioners,

> or its duly authorized agent or agents, elects to compute a ton of coal at twenty-seven cubic feet of coal in the solid or by the measurements of the space for which coal is mined, deducting therefrom all space occupied by slate or other impurities, and in such case the said computation shall be final and binding upon said party of the second part."

So your board reserved the right to collect royalties under these preceding leases on the basis of tonnage at 2,000 pounds of unscreened coal per ton, despite the fact that the statutes in force when they were executed defined a ton as "twenty-seven (27) cubic feet of coal measured in the solid" (S. L. 1903, p. 385; S. L. 1905, p. 341); and when the leases of 1917 were entered into with this company, covering the same acreage as the former leases, your board had thereby already established the precedent, in dealing with this company, of basing the royalties reserved upon *tonnage by weight of unscreened coal.*

In fact, as I am informed, your board for many years prior to 1917, in granting coal mining leases, had in nearly every instance used the same printed form containing the clause above quoted, and had thus insisted that payments of royalties *be based upon tonnage by weight* of unscreened coal, even though the statutes then in force defined a ton as meaning twenty-seven cubic feet of coal measured in the solid. Naturally enough, the board would adhere to the same policy after it had obtained, in 1917, express legislative authority therefor.

With all these facts in mind, it is, we think, of vital significance that in drafting the leases of 1917, soon after the *proviso* above quoted became effective, the expressions "mine run tonnage" and "mine run coal", instead of "measured in the solid", were employed, for "mine run" means the entire unscreened output of a mine (40 Corpus Juris, p. 749).

Our conclusion, therefore, upon the first question in controversy, is that all royalties accruing under these leases must be computed upon the basis of a ton of 2,000 pounds, and not upon the basis of a ton consisting of 27 cubic feet of coal measured in the solid.

Rate of Royalties Payable

There remains to be considered the question as to whether these lessees are obligated to pay royalties at the rate of ten cents per ton or fifteen cents per ton on coal mined on and after June 30, 1922, in case of The Victor-American leases, and on and after October 2, 1922, in case of The Colorado Fuel and Iron Company leases.

Discussion of this question will be prefaced by a survey of the powers of your board, and the limitations thereon, as defined by constitutional and statutory provisions and court decisions construing the same.

Sec. 9, Art. IX of the State Constitution, as amended in 1910,

creates your board and provides that it "shall have the direction, control and disposition of the public lands of the state *under such regulations as are and may be prescribed by law*", etc.

Section 10 of the same article makes it the duty of your board "to provide for the * * * sale or other disposition of all the lands * * * granted to the state by the general government, *under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor.*"

In *In re State Lands*, 18 Colo. 364, the court, in speaking of the effect of these constitutional provisions, said:

> "Therefore, in leasing State lands, the board must first look to the statutes to asertain the regulations therein prescribed, and then, in exercising their constitutional powers, they must so act as in the judgment of the board will secure the maximum amount, under the prescribed regulations. The power to regulate being expressly reserved to the legislature."

In *Walpole v. State Board*, 62 Colo. 554, the court again had said Section 10 under consideration, and said:

> "Under this section of the constitution the board does not in any sense stand in the position of an owner. It is a mere agent with a duty to do no less, and power to do no more, respecting the disposition of State lands under its control, than is provided in * * the Revised Statutes.
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> "While the board is the creature of the constitution it can dispose of State lands only under such regulations as may be prescribed by law; and it has and can have no powers or functions other than those bestowed upon it by legislative enactment.
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> * * *
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> "The constitutional provision which establishes the land board also places its control and regulation with the legislative department of government and the board can act only within the limits and in the manner prescribed by that body."

Section 8, Chapter 134, S. L. 1917, provided, *inter alia*, that "If . . . coal . . . be found upon the state land, such land may be leased for the purpose of obtaining therefrom the . . . coal . . . for such length of time, and conditioned upon the payment to the State Board of such royalty upon the product as the State Board of Land Commissioners may determine."

Section 32 of the the same chapter provided, *inter alia*, that "Any * * * corporation leasing and operating coal lands under the provisions of this act shall pay * * * a minimum price of not less than ten (10) cents for each and every ton of coal

mined from said lands, to be paid monthly, on or before the 25th day of each month for the coal mined during the preceding calendar month."

The effect of these constitutional and statutory provisions and court decisions construing the same is too obvious to require extended comment. Your board is but an instrumentality of the law and it can act, in the control and disposition of state lands, only in accordance with such regulations as may from time to time be promulgated by the law-making power for its guidance. These constitutional provisions and the regulations prescribed thereunder necessarily enter into and become a part of every contract made by your board for the control or disposition of public lands of the State, and this fact was recognized by the very language of these leases, which require payment of the "*stautory royalty* of ten cents for each and every ton", etc.

Each of these leases provides for the payment of a "minimum royalty" of a stated amount per month, the minimum fixed being $200 in one of the leases, and $100 in the other three. The leases further require payment of the "statutory royalty" of ten cents per ton, on all coal mined in excess of the tonnage covered by the "minimum royalty" payments. Paragraph 20, as already noted, reserves the right of readjusting the "*amount* of royalty" to be paid. Lessees have urged that this reservation allows your board to readjust only the amount of "minimum royalty" as fixed by the leases, and not the *rate* of royalty therein provided for. We think this is placing too narrow a construction upon the language of these instruments. Paragraph 20 reserves the right to readjust the "amount of *royalty,*" not the amount of *minimum royalty;* and to give these leases the construction contended for would require us to read into said paragraph the word "minimum" which is not there. Moreover, the object of this reservation plainly was to better enable your board to perform its constitutional duty of obtaining from time to time the "maximum possible amount" for these lands, and that object could not be gained by the reservation of a right to readjust only the minimum amount of royalty.

These leases purport to be for the full term of ten years from their respective dates, but in view of paragraph 20 expressly reserving to your board the unrestricted right, at the end of the first five year period, of readjusting the amount of royalty to be paid by the lessee, it can hardly be said that these instruments are, in substantial legal effect, ten year leases at all. It seems to us that they are, in substance, but five year leases, coupled with an option to the lessee to accept a second five year term at a royalty to be later determined by your board, acting within its constitutional and statutory powers.

In fact it appears from your files that, during the negotiations of The Colorado Fuel and Iron Company with your Board for one of its present leases above described, one of its legal counsel urged the objection that the insertion of paragraph 20 would render the instrument "in reality but a five year lease." But whether these

documents be termed ten year leases, or five year leases with an option to lessee of renewal for a like term with the right of lessor to readjust the rental, or merely five year leases, the indisputable fact remains that the lessee acquired under these instruments *no vested right* to remove coal after "the first five year period" for a royalty of ten cents per ton, or for any other fixed rate. On the contrary, this term of the contracts was left entirely open, to be supplied in the future by the uncontrolled will of the lessor, so far as the lessee was concerned.

But the lessor was, as the lessee was bound to know, a mere agent of the state, forever subject to such regulations as might from time to time be prescribed by law, "with a duty to do no less, and power to do no more", respecting the disposition of state lands under its control than should be provided by law; and was subject always to the mandate of the constitution itself to dispose of these lands only "in such manner as will secure the maximum possible amount therefor."

In 1921 the General Assembly, prescribed a new regulation with reference to coal lands. That regulation provides that "Any * * * corporation leasing and operating coal lands * * * *shall pay* * * * a minimum price of not less than fifteen (15) cents for each and every ton of coal mined from said lands," etc. (S. L. 1921, p. 739).

Since these lessees had acquired, under these leases, *no vested right* to remove coal, after the first five year period, for any fixed rate of royalty, I think this Act of 1921 automatically became a part of these contracts, with the result that after the first five year period had expired no coal could lawfully be mined thereunder at a less price than 15 cents per ton. This statute does more than to provide *that your* board shall fix royalties at a minimum of 15 cents per ton. The statute acts directly, as it were, upon the lessee and requires that he "shall pay" at least 15 cents for each ton of coal mined.

Your board, in this instance, might have exacted a higher price had it so elected, but this minimum price was imposed by the statute itself and wholly aside from any action by your board.

Nor is this, in our opinin, giving retrospective effect to the act of 1921, and thereby rendering it, as so applied, obnoxious to Sec. 11, Art. II of the State Constitution which forbids the passing of any law retrospective in its operation".

We shall set forth at some length our reasons for this conclusion.

The term "retrospective", like the phrase "*ex post facto*", requires explanation, for its meaning as used in the Constitution is much more restricted than its literal signification. This can be demonstrated beyond all controversy. In the early case of *De Cordova v. Galveston*, 4 Tex. 475, it appears that the constitution of the Republic of Texas provided that "no retrospective * * * law * * * shall be made." The court there said:

> "The prohibition against the passage of retrospective laws appears to me equally to require explanation with the inhibition against *ex post facto* laws; for unless the meaning of the restriction is qualified by its object, and the acceptation in which it is to be received can be thus shown, it either means nothing more than is included in the restriction against *ex post facto* laws, and such as impair the obligation of contracts, or it has a latitude of signification which would embarrass legislation on existing or past rights and matters to such an extent as to create inextricable difficulties, and in fact to demonstrate that it was incapable of practical application."

In *Johnston v. United States*, 17 Ct. of Claims Repts., 171, the court declares that:

> "A statute does not operate retrospectivly when it is made to apply to future transactions, merely because these transactions have relation to and are founded upon antecedent events; or, as was said by Denman, Ch. J., in *Reg. vs. Whitechapel*, 12 Q. B. 127, 'because a part of the requisites for its action is drawn from time antecedent to its passing'."

Our Supreme Court has always held that this Constitutional inhibition is not to be taken in its literal sense, but that the term "retrospective" must be given a limited meaning in accordance with the sense in which it was used and applied as a factor in legal science, by jurists long before our constitution was written. Thus in *Fisher v. Hervey*, 6 Colo. 20, we read:

> "The objection to retrospective statutes does not apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations:"

In the earlier case of *Denver, etc. Ry. Co. v. Woodward*, 4 Colo. 165, the court cites with apparent approval *Rich v. Flanders*, 39 N. H. 307, where it was asserted that the term "retrospective", is "a technical term" which applies only to civil cases "and to those only in a particular way".

In the *Woodward case* a retrospective law is defined as follows:

> "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Such is, in fact, the classical definition of a retrospective law, as first formulated by Justice Story, more than one hundred years ago in the leading case of *The Society, etc. vs. Wheeler*, 2 Gallison 139. In that case the question before the court was, as stated in the *Woodward case*, "whether a statute of New Hampshire, allowing to tenants the value of improvements on recoveries against them, could be constitutionally construed to apply to past improvements", and the court held it could not, because to give such construction would be to divest the owner of his already *vested right* to such improvements (See p. 144).

As further defining the scope, meaning and effect of constitutional provisions against retrospective laws, we shall refer to numerous decisions of our own and other courts of last resort. But let it be said at once that upon diligent search we find no judicial decision denouncing a statute as "retrospective" in the sense in which that term is used in constitutional provisions such as the above, except in those cases where it would in its operation (1) impair the obligation of an existing contract, or (2) divest a property right already vested, or (3) encroach upon some recognized principle of natural justice.

In passing, it will be observed that "a right cannot be considered *vested* unless it be something more than such a mere expectation as may be based upon an anticipated continuance of a present given law." (*Perry v. Denver*, 27 Colo. 96; Cooley, Constitutional Limitations, 7th Ed. p. 511). On the contrary, it must, as Judge Cooley says, "have become a *title*, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

In the *Woodward case, supra*, it was held that an *already accrued right of action*, founded upon a statute, for the recovery of damages for an injury resulting in death was not divested by the repeal of the statute, for to give the repealing act such a construction would render it retrospective in its operation. The court quotes with apparent approval from the case of *Clark v. Clark*, 10 N. H. 380, where, in discussing the meaning of "retrospective", the court said: "But if a right has become *vested and perfect*, a law, which afterward annuls or takes it away, is retrospective."

In *Brown v. Challis*, 23 Colo. 145, the court held that the right of a tenant in common of lode mining claims to have the same sold in a partition suit authorized by a statute could not be extinguished by an amendatory act passed pending the partition proceedings. The court pointed out that sale of the property was the only feasible relief that could be awarded in a suit to partition such property, and that to take away the right to a decree for the sale of the property *would amount to the denial of all appropriate relief*. The court there said "A constitutional inhibition goes to the substance of the evil, not the shadow."

In *Evans v. Denver*, 26 Colo. 193, the court held that where a city constructed a sewer without certain essential conditions preced-

ent thereto having been observed, with the result that the special assessments levied to pay for the same were declared invalid by the courts, a subsequent statute authorizing the city, upon declaring the sewer necessary for sanitary purposes, to assess the reasonable value thereof against the adjoining lots, was retroactive "in its legal sense" because it gave a different legal result to a transaction wholly past "by attempting to make legal that which before was void", and *rendered nugatory* the *complete defense* against the original assessments, and because it authorized "the imposition of a *liability* with respect to a past transaction *which, before, had no existence.*"

In *Ducey v. Patterson,* 37 Colo. 216, the Court held that a statute which changed the common law rule by providing that the release of one or more joint debtors shall not release the remaining debtors, did not apply to the release of some of the joint debtors under a judgment rendered before the statute went into effect, where the unreleased debtor had a right to have the judgment first satisfied out of the property of the debtors who were released; because to give the statute such application would render it retrospective in its operation. The court said:

> "It must be conceded that Stratton (the unreleased debtor) had a *vested interest* in the judgment, *as it was rendered,* and as such had a right to have the judgment satisfied out of the property of the Duceys (the released debtors) before resort was had to his estate for satisfaction."

In *Colorado Springs v. Neville,* 42 Colo. 219, the court held that where a statute required, as a condition precedent to right of action, that a person injured upon a street of a city must give to an officer thereof a prescribed notice of the injury, such notice must be given even though the statute be repealed before suit is brought, because said Sec. 11 Art. II would operate as a saving clause in the repealing act "saving to plaintiff her vested cause of action, and to defendant its defenses thereunder, which could not be taken away."

The Court also said:

> "In those jurisdictions where there is no constitutional inhibition upon retrospective legislation, unless the intention of the legislature is clearly manifested to the contrary, the courts will give only a prospective effect to public laws; and where, as in Colorado, there is a constitutional prohibition against this species of legislation, it would be beyond the power of the legislature, even by manifesting its intention to do so, to pass retrospective laws *which substantially affect, injuriously, vested rights.*"

In *Day v. Madden,* 9 Colo. App. 471, the court said:

> "The most satisfactory discussions of this question which we have been able to find are in the New Hampshire

decisions, in which state the constitution contains a provision like ours, save there is added the clause substantially that retrospective laws which are injurious, oppressive or unjust shall not be passed. It does not seem to us that the addition of these words in any wise enlarges the force or alters the construction which must be put upon it, or that any law, even though retrospective in its character, would be held to be violative of our general constitutional restriction, unless it was evident that the statute which was passed *was injurious, oppressive or unjust in its effect.*"

The constitution of New Hampshire denounces retrospective laws as "highly injurious, oppressive and unjust" and declares that "no such laws should be made", etc (*Clark v. Clark*, 10 N. H. 385). In *Loveren v. Lamprey*, 22 N. H. 445, the court defined a retrospective law as follows:

"But what is a retrospective statute within the meaning of our constitutions and laws? It is not a remedial statute, properly so called; neither is it one which is to operate upon contracts subsequently made, or rights subsequently acquired; but one which *impairs contracts* already existing, and affects and changes rights *already vested*. And what are vested rights, but such as are determined, settled, *fixed;* such as are not liable to any contingency? Unless our conception of the meaning of 'vested rights' is entirely erroneous, we cannot discover wherein any thing had become vested by the will of Benjamin Loveren until his decease. Up to that time no rights whatever were fixed, but all was expectant, contingent, and uncertain."

In *Gilman v. Cutts*, 23 N. H. 382, the court lays down this decisive test:

"A new statute is not retrospective if the right which is to be affected by it has not become vested; otherwise, if it has."

In *De Cordova v. Galveston*, *supra*, the court, in discussing the subject of retroactive laws, said:

"Nor can acts of the Legislature be opposed to those fundamental axioms of legislation unless they impair rights which are vested, because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State produces amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee."

In *Hamilton v. Flinn*, 21 Tex. 716, the court declares that the test "of retroactivity is not whether a *hope, expectancy* or a *mere inchoate right*, but whether a *vested right* to possess certain things according to the laws of the land is *impaired* or *defeated?*"

The constitution of the State of Missouri contains a provision forbidding the enactment of laws "retrospective in character". From *Gibson v. Railroad*, 225 Mo. 481, we quote the following:

> "The decisions here and elsewhere held, that before a statute can be denounced as invalid under the provisions of the constitution prohibiting retrospective legislation, it must impinge some existing *vested right.*"

The Bill of Rights of the State of Tennessee provides that: "No retrospective law, or law impairing the obligation of contracts, shall be made." In *Wynne's lessee v. Wynne*, 2 Swan's Repts. 409, 410, the court says:

> "This section of the Bill of Rights has been so often directly and indirectly before the courts, and has received such a uniform legal construction, that we do not feel authorized, were we so inclined, to depart from it.
>
> "We understand that construction to be, that retrospective laws may be made where they do not impair the obligation of contracts, or divest or impair vested rights." And further:
>
> "In many other cases, a retrospective law is defined to be a law infringing or divesting vested rights. A retrospective statute, affecting or changing vested rights, is generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void."

In *Shields v. Clifton Hill Land Co.*, 94 Tenn. 148, it is stated that the above prohibition against retrospective laws "does not mean that absolutely no retrospective law shall be made, but only that no retrospective law which impairs the obligation of contracts, *or divests or impairs vested rights,* shall be made."

The constitution of Louisiana prohibits the passing of any "retroactive law". In *City v. Railroad Company*, 35 La. An. 681, the court says that: "It is well settled by reason and weighty authorities that no law is retroactive, unless it impairs the obligation of antecedent contracts; or divests pre-existing vested rights."

The passage of "retroactive" laws is expressly forbidden by the constitution of Georgia. In *Pritchard v. Savannah Railroad Co.*, 87 Ga. 298, we find the following very pertinent observations:

> "It is not unconstitutional for the legislature to take away a right which is not vested, but contingent upon some event subsequent to the date of the statute. Before the occurrence transpires upon which an inchoate right is

to become vested and unalterable, a law may be passed providing, in effect, that the happening of such occurrence shall not make that right complete."

When in the light of the above uniform current of authority, it is considered—(1) That these lessees had, when the act of 1921 was adopted, *acquired no vested right* to mine coal at any fixed rate of royalty after the first five year period, respectively, should expire; (2) that your board was always subject to legislative control; (3) that, even though the statute of 1921 had never been enacted, your board would have had full power, under the express terms of the leases themselves, to raise the royalty for the second five year period to 15 cents per ton, or even more; (4) that it was always the *mandatory duty* of your board, *under the constitution itself*, and wholly irrespective of the act of 1921, to so dispose of these lands as to "secure the maximum possible amount therefor"; (5) that, while these leases were executed prior to the passage of that act, the imposition of the vital condition, i. e., the rate of royalty, under which the lessee might exercise its right of renewal or continuance of the lease for a second five year period *was not then a past transaction*, but was a transaction that the parties to these instruments *had deliberately left entirely open for future determination;* (6) that when that act went into effect the second five year periods of these leases had not yet even begun; and (7) that the lessee was in fact never required to pay the increased royalty at all, but had the right, under paragraph 20, to terminate its lease by giving notice to your board; it is clear that this act of 1921, as applied to royalties that *would thereafter become payable* during the second five year periods of these respective contracts, could not possibly be regarded as a retrospective law in the sense or intent of the constitutional prohibition.

A matter very closely related to the above must now be noticed.

There is a settled rule of statutory construction that, *independently of any constitutional prohibition*, statutes will ordinarily be so construed as to have a prospective effect only, and will not be given a retrospective operation, except in those cases where such an intent on the part of the legislature is apparent. (See Cooley, Constitutional Limitations, 7th Ed. p. 529; Endlich, Interpretation of Statutes, Sec. 271; Sutherland, Statutory Construction, Sec. 463). Our courts have recognized this doctrine (See *Pittinger v. Pittinger*, 28 Colo. 315; *Edelstein v. Carlile*, 33 Colo. 57; *Bonfils v. Public Utilities Com.* 67 Colo. 567; *Colorado Springs v. Neville, supra; United States v. McPhee*, 51 Colo. 431; *British Am. Co. v. Colorado Co.*, 52 Colo. 600.)

This rule of statutory construction was adopted to serve the same ends as our constitutional prohibition, viz.: the prevention of the injustice that would result from disturbing *vested rights of property*. That such is the fact is readily established.

We quote from *Endlich, supra*, Sec. 271: "Upon the presump-

tion that the legislature does not intend *what is unjust* rests the leaning against giving certain statutes a retrospective operation". And further, Sec. 273: "It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question prevails".

Sutherland, supra, says, Sec. 463: "As retrospective laws are generally *unjust* and in many cases oppressive, they are not looked upon with favor. Statutes not remedial will therefore not be construed to operate retrospectively, even when they are not obnoxious to any constitutional objection, unless the intent that they shall do so is plainly expressed or made to appear." *McGehee* in his work on *Due Process of Law,* p. 153, says: "The sweeping maxims of the Roman jurists in condemnation of all retroactive laws were adopted by Bracton in the thirteenth century and have been repeated by Coke and Bacon, and applied by the English courts in the only way possible under an omnipotent parliament; namely, as a rule of construction to the effect that a statute will never be held to *divest vested rights* if it is capable of any other meaning."

That such is the purpose of the rule is recognized by our own Supreme Court. In *United States v. McPhee, supra,* the court says:

> "Legislative enactments will not be construed as retrospective in their operation, *even when permissible,* unless it is clear they were intended to do so. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of parties or will affect or interfere with their antecedent rights. It is founded on the soundest principles of public policy, and its reason is manifest. Every citizen is presumed to know the law, and to enter into business engagements in accordance with its provisions. It would be *manifestly unjust,* even in cases where a legislative body is empowered to enact laws to some extent retroactive in effect, *to take away pre-existing rights,* even so far as the remedy only is concerned by judicial construction of a doubtful statute, unless it is clear that such is its purpose."

It should be observed, however, that the courts, in expounding the doctrine that statutes will not ordinarily be given a *retrospective* operation, appear to have sometimes used the term "retrospective" in a somewhat broader and more literal sense than it is used in the constitution, where, as we have shown, it must be construed as a technical term of a definitely fixed legal application. For example, in the *McPhee case, supra,* the Court says that "Legislative enactments will not be construed as *retrospective* in their operation, *even when permissible,* unless it is clear they were intended to do so." Now, of course, statutes "retrospective in their operation" *in the constitutional sense are never permissible,* for the constitution expressly declares that *no* such law shall be passed. Hence it seems that the court here uses the word "retrospective"

in somewhat of its literal, or general, signification rather than in the narrower sense in which it is used in the constitution.

This brings us directly to the question:

Under this rule of statutory construction that legislative acts will not be allowed to operate retrospectively unless the intent that they shall do so is clear, does the act of 1921 govern as to the rate of royalties payable during the second five year periods of these leases? In other words, would it be giving this statute a retrospective operation, *within the meaning and intent of the above rule*, to so apply it?

We do not hold that this act could or did apply to the remaining portion of the, then current, first five year period of these leases, or that it could take effect so long as the lessees had any pre-existing contractual right to a lower rate of royalty than the minimum rate prescribed by this statute. But it is altogether too clear for argument that when these first five year periods ended, and the existing contractual right of the lessees to a fixed rate of royalty had thereby lapsed, this statute, *then already in existence* could and did, in the absence of further action by your board, determine the rate of royalties *thereafter to accrue*, and that to give the statute such effect does not render it retrospective within the meaning or intent of the above rule.

Doubtless your board, in granting these leases, could have fixed a ten cent royalty for the entire ten year period named therein In such event, the lessees would have acquired a vested right that could have been disturbed by no subsequent law prescribing a higher minimum rate. But these contracts secure to the lessees no such right. On the contrary, your board expressly reserved the unqualified right to readjust the royalty for the second five year period, and thus the whole matter was, by the voluntary and deliberate act of the parties themselves, left in suspense, with no right, on the part of the lessees to continue to operate at the original rate, or at any other pre-determined rate.

While your board might have fixed a rate, for the entire ten years, that the legislature could not have disturbed by any subsequent law, it could have done this only by entering into a contract whereby the lessee acquired a *vested right* to have such rate maintained. It could not, even had it so intended, effect any such result by merely attempting to reserve the right to act according to its unconstrained will at a time five years in the future. For when these parties accepted contracts from your board, as an agency of the State, that vested in them no right to remove coal during the second five year period at any defined rate of royalty is necessarily followed that the principal,—the State was left at liberty to exercise its own will in that regard. Otherwise stated—When these companies accepted leases that did not bind them to pay, or the state to accept, any prescribed rate of royalty for the periods in question the legislature remained free to prescribe the rate; for surely the agent could not divest the principal of power to act

by simply declaring that it reserved to itself full power to act. That would be contrary to every principle of the law of agency.

The principal, of course, is bound by the authorized acts of his agent, but it would be absurd to say that the agent could, in dealing with a third person, reserve to himself any right to act in the future in contravention of the will of his principal.

Your board may grant leases to mine coal at a fixed rate of royalty for a stated term, and such rates, if it has acted within the limits prescribed by law, are beyond legislative interference, for the reason that the lessee has a vested property right therein; but your board cannot, by merely reserving a right to act in the future, divest the legislature of its power to prescribe, in the meantime, a new rule to govern such future action, where no private right has already attached.

Suppose, for illustration, that your board had, in readjusting these royalties, attempted to fix a rate of 11 cents per ton. Could such action stand in the face of this act of 1921 which provides that the lessee of coal lands "shall pay" at least 15 cents per ton? We think not. We are of the opinion that, since there was no outstanding contract that gave these lessees the right to continue to remove coal at a less rate than 15 cents per ton, the act of 1921 *ex propria vigore* imposed a rate of .15 cents per ton, and that no action or non-action of your board could have relieved them of this requirement.

To pursue this subject still further—let it be asked—In whose behalf was this reservation made? Certainly not the lessees, for they were already enjoying the minimum rate allowable by law. Was it, then, made in behalf, merely, of your board? No, for your board had no interest whatever in the matter, for it is only an instrumentality of the state. The reservation, plainly enough, was made in behalf of the state itself. That being true, why could not the state, acting through the branch of its government which is authorized to prescribe regulations for the control of its public lands, avail itself of the reservation made in its behalf, where no private rights of property would thereby be encroached upon. There is, in our judgment, but one possible answer to this question. The reservation made by your board saved the right of the State, acting through the General Assembly, to prescribe a new minimum rate which the lessee must pay, in the absence of a higher rate fixed by your board.

It appears, as above stated, that in the case of the Victor-American leases your board took no action to readjust the royalty until July 20, 1922, and that in the case of the Colorado Fuel and Iron Company leases it is claimed that no notice of such readjustment was received by the lessee until January 10, 1923. Lessees now contend that the action taken by your board to readjust these royalties was not in apt time to bind them to the payment of the new rate.

The records of your board do not disclose why its action in these matters was delayed. However, it does not appear that

lessees were, in fact, misled, or that they suffered any prejudice as the result of the failure of your board to act immediately upon the expiration of the first five year period, or that the elements of an equitable estoppel were present. Nor do these contracts provide that time shall be of their essence. Our Supreme Court appears to have adopted as the law of this state the dictum of Judge Dillon that the doctrine of equitable estoppel can be invoked against the public only in exceptional cases where justice and equity so require (See *Mouat Lumber Co. v. Denver*, 21 Colo. 8; *Colorado Springs v. Colorado City*, 42 Colo. 88). In view of these facts it might well be contended that your board had a reasonable time, after the expiration of the first five year period, to act, and that the action it did take was, in view of all the circumstances, within such reasonable time. But since your board did not attempt to advance the rate of royalty above the new minimum already imposed by statute, we regard this question as immaterial and, of course without waiving it, express no opinion upon it at this time.

Respectfully submitted,

WILLIAM L. BOATRIGHT,
Attorney General.

By CHARLES ROACH,
Deputy.

280. ELECTIONS

To A. H. Asmus, County Clerk, Nov. 4, 1926.

Under Sec. 7588, C. L. 1921, publication of notice of an election should be published in a daily paper if there is one in the county.

281. SOLIDERS' AND SAILORS' HOME

To John F. Greene, Commandment, Nov. 8, 1926.

Where an inmate of the Colorado Soldiers' and Sailors' Home dies intestate, leaving no heirs at law, his estate escheats to the State and the proceeds thereof become a part of the public school fund under the constitution.

282. SCHOOLS

To Frederick L. Whitney, Nov. 10, 1926.

A mandatory law providing for boards of education paying high school tuition of pupils in other districts when high school privileges are not offered in the home district would be unconstitutional but a discretionary law would probably be valid.

283. ELECTIONS

To K. E. Moscript, Nov. 12, 1926.

Death of Candidate

Where a candidate for a county office dies on election day, and upon counting the votes it is found that the decedent has polled the greatest number of votes for the office, there is no election as to that office.

The candidate receiving the next highest number of votes is not entitled to a certificate of election.

Upon the expiration of the term of the incumbent, a vacancy occurs, to be filled by appointment by the Board of County Commissioners.

284. COLORADO AGRICULTURAL COLLEGE

To Dr. Chas. A. Lory, Nov. 13, 1926.

The appropriation for vocational rehabilitation provided for by Chap. 156, S. L. 1925, is a permanent appropriation and the balance unexpended at the end of the present biennial period does not revert to the general fund.

285. JUSTICE OF THE PEACE

To Mr. D. J. Penno, Nov. 16, 1926.

A justice of the peace appointed to fill a vacancy holds office until the next regular election or until the vacancy is filled by election according to law. Consequently if no one was elected at the general election to fill out the unexpired term the appointee holds over until the second Tuesday in January, 1927.

286. BLIND BENEFIT FUND

To Commission for Blind, Nov. 20, 1926.

Under Sec. 8, Ch. 60, S. L. 1925, the fees of oculists must be borne entirely by the respective counties.

287. COUNTY TREASURER

To Mr. B. F. Ayers, County Treasurer, Nov. 22, 1926.

A county treasurer is not liable for money collected by a county sheriff under a distraint warrant issued by the treasurer when the sheriff embezzles the money so collected.

288. COLORADO SCHOOL OF MINES

To Mr. M. F. Coolbaugh, Nov. 23, 1926.

Instructors in the Colorado School of Mines are not under civil service.

289. STATE LAND BOARD

The State Board of Land Commissioners may expend moneys out of their cash fund for the purpose of paying the expenses of a delegate to Washington to urge the passage of an Act of Congress confirming the title of the State to the school lands granted the State under the Enabling Act.

To the State Board of Land Commissioners, Nov. 27, 1926.

Gentlemen:

The question has been submitted to this office as to whether it would be lawful for your Board to pay the expenses of a member of your Board, or of some other person, to be incurred in traveling to Washington, D. C., and remaining there for such period of time as might be necessary for the purpose of urging upon Congress the enactment of legislation confirming the title to this State to the school lands granted the State under the Enabling Act, pursuant to which Colorado was admitted to the Union.

It may be stated at the outset that there can be no doubt whatsoever as to the desirability of procuring, if possible, the enactment of such a law by Congress, since the title of this State to a large and undetermined number of sections of its school lands will always be in jeopardy until this matter is settled by appropriate legislation, because of the fact that mineral lands were by said Enabling Act withheld from the grant, and as the law now stands, there is no limit of time within which the Federal Government may attempt to reassert its title to these lands upon the ground that they are mineral in character and known to be such at the time the grant to the State thereof would otherwise have taken effect. It is, therefore, plainly of incalculable importance to the state that appropriate legislation be procured from the Congress to the end that the just rights and interests of the State in these school lands be not left forever in jeopardy.

It may be further stated that all of the western states which have similar grants of school lands are about to make a concerted effort upon the opening of the coming session of Congress to procure the enactment of effective legislation along the lines above indicated, and it is believed that concerted action on the part of all the states immediately concerned affords great promise of speedy and effective results, and this fact emphasizes the importance of Colorado now joining with her sister states in this attempt to procure the needed legislation.

The first legal question that arises is whether or not it would be proper expenditure of public money to pay the expenses of an official or unofficial delegate to Washington to aid in procuring the passage of the legislation mentioned.

Analogous questions have often been presented to this office for consideration. Under date of August 30, 1920, this office advised Governor Shoup that the boards of control of the various state educational institutions had no power to use any of their funds for the purpose of promoting the adoption of the then pending constitutional amendment providing for additional mill levy for the

maintenance of such state educational institutions. (See Biennial Report, Attorney General, 1919-1920, page 166).

Under date of July 11, 1922, this office advised Governor Shoup that it would not be proper for him to contribute any public funds in support of a campaign for the adoption of the then pending proposed amendment to the state constitution providing for an income tax. (See Biennial Report, Attorney General, 1921-1922, page 130).

But under date of April 19, 1922, this office advised the county attorney of Routt County that his county might employ and pay the expenses of a delegate to represent the county before the Interior Department at Washington, for the purpose of presenting arguments to induce that Department to revoke an executive order promulgated by it, where such revocation would be of great advantage to the financial interests of the people of the county. (See Biennial Report, Attorney General, 1921-1922, page 119).

The distinction recognized by these various opinions is clear. In the first two instances it was a question of spending money belonging to the State to induce the people of the State to adopt certain amendments to the state constitution. Plainly stated, it was a proposition to spend the money involuntarily contributed through taxation by the people of the State to induce the people of the State to amend their own constitution. This office held such a thing could not be done because it would be improper to spend the money of the people to induce the people to exercise their elective franchise in a certain way thought by their officers to be beneficial to them, but in the last instance above cited, the question was whether the funds of a county could be used to induce by fair means the Federal Government to take certain action that would be beneficial to the county, and we there expressed the opinion that county funds could properly be used for such a purpose.

In L. R. A. 1917B, at page 358, is found an exhaustive note upon the subject of the power of a governmental body to use public funds to promote the passage or secure the defeat of a law. One of the cases there discussed is that of *Meehan v Parsons,* 271 Ill. 546, and this seems to be a well reasoned case on this general subject. It was there held that the City of Cairo, Illinois, might lawfully pay its Mayor his expenses in going to Washington and interviewing senators and congressmen in the endeavor to induce them to vote an appropriation for strengthening and repairing levees and embankments along the Ohio River in and about the city. The court pointed out that such appropriation would be to the financial interest of the city and would relieve it from a burden that would otherwise have to be borne by the city alone, and that therefore it was proper and legitimate to expend funds of the city to induce by proper means federal legislation for the relief of the city.

In *Denison v. Crawford,* 48 Iowa 211, it was held proper for a county to employ and pay an agent to urge upon Congress the enactment of legislation conveying to or confirming in the county title to certain swamp lands within the borders of the county.

My conclusion upon this preliminary question is that it would be entirely proper for your Board to expend any funds it may have available for the purpose of covering the expenses of a delegate whether a member of your board or otherwise to Washington to aid in urging the enactment of the legislation above described.

The next question to be considered is whether or not your Board has any funds available for paying the traveling and other expenses of a delegate to Washington.

Section 1159, C. L. 1921, provides for the collection by your Board of a certain schedule of fees therein provided for; that section makes it the duty of the State Treasurer to credit the fees collected by your Board to the Land Commissioners' Cash Fund, and the section provides that it shall be the duty of the Auditor of State to draw warrants against said fund "in payment of such vouchers as may be audited and allowed by the State Board of Land Commissioners and certified to by the President and Register of the State Board of Land Commissioners.

This broad language, in my opinion, renders this cash fund available for expenditure by your Board for any legitimate expenses incurred by your Board in the conduct of its business and the carrying out of the trust devolved upon it by the constitution and statutes of this State.

The Act of 1887 defining the powers and duties of your Board provided, in Section 6 thereof, a schedule of fees to be collected by your Board and contained a provision to the effect that such fees might be used for the purpose of encouraging immigration "and such other purposes as the said State Board of Land Commissioners may direct". (S. L. 1887, page 330).

Former Attorney General Miller in construing that section said, "The latter section is sufficient authority for the Land Board to draw warrants upon the fund created by the collection of fees for the payment of any expenses incurred by the Land Board in pursuance of its business, as it may see fit." (See Biennial Report, Attorney General 1905-1906, page 213).

In an opinion rendered by Attorney General Farrar, under date of May 15, 1913, it was pointed out that under Section 5172 R. S. 1908, which is similar to said Section 1159, C. L. 1921, certain of the fees collected by your Board are for specific purposes; that is to say, the statute provides for the payment of an advertising fee of $5.00 in case of application for lease, an appraisement fee of $10.00 in case of application for purchase, and an advertising fee of $17.00 where your Board orders a sale to be made, and Mr. Farrar held that these fees collected for specific purposes must be used primarily for those purposes and that that part of your cash fund which is made up of items collected for specific purposes could be applied to the payment of the general expenses of your Board, only after the specific purposes for which such items of fees had been collected should be satisfied. (See Biennial Report, Attorney General, 1913-1914, page 39).

Section 14 of Chapter 16, S. L. 1925, which is the Long Appro-

priation Bill for the present biennial fiscal period provides that all fees of your Board are appropriated for paying the expenses of your Board as defined in said section. However, that statute, at most, controls the disposition of the fees of your Board only for the present biennial fiscal period which expires November 30, 1926. I understand that the expenses now contemplated would probably not aggregate more than from $500.00 to $1,000.00, and I am advised that on December 1, your Board will have on hand a balance in your cash fund that will be ample to pay the expenses now in question in addition to all ordinary demands upon said cash fund, and my conclusion, therefore, is that it would be proper for your Board to pay the expenses of a delegate to Washington out of your cash fund.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
By CHARLES ROACH,
Deputy.

290. STATE INDUSTRIAL SCHOOL

To Rex B. Yeager, Dec. 14, 1926.

The Board of Control of the State Industrial School cannot pass and enforce rules governing the employes of the school which conflict either with the civil service rules or the Workmen's Compensation Act.

291. PENITENTIARY

To Governor Morley, Dec. 16, 1926.

The Governor as chief executive of the State has the right to investigate the physical condition of inmates of a state penal institution by and through regularly commissioned physicians in good standing.

Sec. 2, Art. IV, Colo. Const.

State ex rel. Stubbs v. Dawson, 86 Kansas, 180; 39 L. R. A. (N. S.) 993, 996.

292. PUBLIC ACCOUNTANTS

To Wm. D. Morrison, Dec. 17, 1926.

Changes in rules of State Board of Accountancy must be in accordance with the provisions of Sec. 4727, C. L. 1921.

293. TAXATION

The County Commissioners have no power to abate, rebate or refund taxes after they have accrued unless specifically so authorized by statute.

To E. B. Morgan, Chairman Colorado Tax Commission, Dec. 23, 1926.

Dear Sir:

I have your letter of December 9, inquiring as to the right of

your Commission to approve the action of Boards of County Commissioners in abating any part of accrued taxes, interest or penalties upon property which has never been sold by the county treasurer, and where the petition for abatement is not based upon some error in assessment, over-assessment or similar ground.

Section 7460, C. L. 1921, provides that no abatement, rebate or refund of taxes shall be allowed by county commissioners without hearing and notice, etc., and that in case any abatement, etc., shall be recommended by the county commissioners they shall certify to your Commission their findings, etc., and that such abatement, etc., shall become effective upon the endorsement thereon of the approval of your Commission. This section further provides that in case your Commission shall disapprove the recommendation of the county commissioners they shall endorse such disapproval thereon and return it to the county commissioners with a statement of their reason therefor, and that no abatement, rebate or refund of taxes shall be allowed by said county commissioners if the application is disapproved by your Commission. This section, of course, refers only to cases where the county commissioners have power to grant an abatement, rebate or refund, and we must look elsewhere for this power.

From an investigation, I am of the opinion that county commissioners have no power to abate, rebate or refund taxes after they have accrued, unless specifically so authorized by statute. The following is quoted from 37 *Cyc* 1170-1171:

> "The state has general power to compromise or release its claims against debtors, and may therefore, by appropriate legislation, release or remit particular taxes altogether or authorize their compromise or settlement on part payment, unless prevented by constitutional prohibition. * * * It seems that counties, towns, and municipal corporations cannot compromise or release claims for taxes legally assessed, at least if the debtor is able to pay, unless they are authorized by the legislature to do so, and certainly they cannot do so even then if there is a constitutional prohibition."

4 *Cooley on Taxation*, Section 1616 (Last Edition) states that the law on this subject to be that when the assessment has passed from the assessor's hands the right to an abatement must, in general, depend upon the statute. No doubt the legislature might abate taxes; but taxing officers or boards must have special authority to warrant their doing so.

In *Case v. City of Detroit*, 129 Mich. 298, 88 N. W. 626, it was held that where property was destroyed by fire after the taxes had been spread on the assessment roll, the owner was not entitled to a rebate of the taxes; and this even though the property were destroyed by fire before the beginning of the year for which the taxes were levied.

In *State v. Central Pacific R. Co.*, 9 Nev. 79, the state sought

to recover from the railroad company certain delinquent taxes. Before the trial, the railroad company made with the Board of County Commissioners a compromise settlement whereby the county commissioners agreed to accept less than the full amount of the taxes. The Supreme Court of Nevada held that the Board of County Commissioners had acted without authority. The following is quoted from the opinion at page 89:

> "The Board of County Commissioners is an inferior tribunal of special and limited jurisdiction. It must affirmatively appear that the action of the board in compromising with defendant was in conformity to some provision of the statute giving to it that power, else its order was without authority of law and void."

Again on page 90 the court said:

> "By the provisions of Section 3 of the revenue act, the tax when levied became a lien against the property of defendant. After the commissioners had acted as a board of equalization, an obligation immediately arose on the part of defendant to pay the State the amount of taxes due. The commissioners could not, thereafter, release defendants' property from the lien created by statute, nor discharge defendant from its obligation. The tax must be paid in full or its payment avoided upon some of the other grounds allowed as a defense in Section 32 of the revenue act."

A case similar to the one last cited is *Territory of Arizona v. Gaines,* Tax Collector, 11 Ariz. 270, wherein the court said at page 277:

> "Jurisdiction to remit or compromise taxes we should find conferred in express terms carefully conditioned; it may not be predicated upon an inference. We conclude, therefore, that the attempted compromise pleaded by respondent was void."

The last cited case was a proceeding brought by the Attorney General to compel the tax collector to institute a suit to collect delinquent taxes. The collector defended upon the ground, *inter alia,* that the Board of Supervisors had compromised with the property owner upon the amount of taxes to be paid. The Attorney General maintained that the board had no power to compromise and this contention was upheld by the Supreme Court of Arizona.

Without referring at length to the several sections of our statutes, I may say that none of them, in my opinion, gives to the Board of County Commissioners the power to abate taxes in such cases as you mention. All of the sections pertaining to the right of the County Commissioners to abate taxes have to do with cases where the assessment is erroneous, or illegal, or double, except Section 7422 which gives to County Commissioners the right to

sell tax sale certificates for less than the amount due upon them. In this connection see also Sections 7335, 7387 and 7447.

It seems, therefore, under the present condition of our law that in such cases as you refer to, the property should be sold and bid in by the county if no purchaser appears at the sale. After this is done, the commissioners are at liberty to sell the tax sale certificate for the best price obtainable.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

OLIVER DEAN,
Assistant Attorney General.

294. TAXATION

To E. B. Morgan, Dec. 23, 1926.

Under Section 7216, C. L. 1921, the State Tax Commission may authorize an increase of 5 mills, even though the levy including the 5 mills exceeds the limits prescribed by Sections 8286 and 8411, respectively.

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